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Nos. 28 and 29

In the Supreme Court of the United States

OCTOBER TERM, 1952

UNITED STATES OF AMERICA, ON THE RELATION OF OSCAR L. CHAPMAN, SECRETARY OF THE INTERIOR, PETITIONER

v.

FEDERAL POWER COMMISSION AND VIRGINIA ELECTRIC AND POWER COMPANY

AND

VIRGINIA REA ASSOCIATION, ET AL., PETITIONERS

v.

FEDERAL POWER COMMISSION AND VIRGINIA ELECTRIC AND POWER COMPANY

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR FEDERAL POWER COMMISSION

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OPINIONS BELOW

The opinion and order of the Federal Power Commission are reported in 87 PUR NS 469 and appear in the printed record, I, 41–78.[1] The

[1] References to the printed record are to the six volumes submitted to the Court, I, etc. References to the unprinted record are given as "R. —." References to the appendix to petitioners' brief in No. 28 are "Pet. App. —."

opinion of the United States Court of Appeals for the Fourth Circuit is reported at 191 F. 2d 796 and appears in the record, V, 29.

JURISDICTION

The judgment of the Court of Appeals was rendered on October 1, 1951 (V, 28–46, 68). Petitions for rehearing filed on October 30, 1951 (V, 47) were denied on November 5, 1951 (V, 64, 72). Petitions for certiorari were filed (V, 75), and certiorari was granted on May 5, 1952 (VI, 71, 343 U. S. 941). The jurisdiction of this Court is said to be invoked under Section 313 (b) of the Federal Power Act.

QUESTIONS PRESENTED

I. Whether Section 10 of the Flood Control Act of 1944, "approving" a comprehensive plan of development for the Roanoke River Basin, "authorized" the Roanoke Rapids project as a federal project and precluded the Federal Power Commission from issuing a license under the Federal Power Act for construction and operation of the Roanoke Rapids development by Virginia Electric and Power Company (VEPCO).

II. Whether the Commission is precluded from granting the license here questioned by reason of its concurrence in the comprehensive plan of the Corps of Engineers for the development of the Roanoke River Basin.

III. Whether the petitioners are "aggrieved" parties so as to be entitled to court review of the Commission's order issuing a license for development of a hydroelectric project in the Roanoke River, North Carolina.

STATUTES INVOLVED

The provisions of the Federal Power Act (41 Stat. 1063, as amended, 16 U. S. C. § 791a, *et seq.*) appear in the pamphlet copy of the Act submitted with our brief in opposition. The pertinent provisions of the Flood Control Act of 1944 (58 Stat. 887) are set out in the text and in Appendix to petitioner's brief, pp. 18–26.

STATEMENT

The petitions filed in this case under Section 313 (b) of the Federal Power Act (I, 1–40) seek review of the order of the Federal Power Commission issued January 26, 1951 granting a license to Virginia Electric and Power Company under the terms of the Federal Power Act for construction of a hydroelectric power project on the Roanoke River at Roanoke Rapids, designated by the Commission as Project No. 2009.

On October 6, 1948 VEPCO filed an application under the Federal Power Act for this project and on April 6, 1949 amended the application to show certain changes in the project design. A hearing was held in May and June

1949 before the Commission's Chief Presiding Examiner sitting as a Hearing Examiner. Virginia REA Association and its member cooperatives (petitioners in No. 29), Carolina Power & Light Company and Appalachian Electric Power Company were permitted to intervene by the Commission's order of May 9, 1949 (V, 22), but that order denied intervention to the Secretary of the Interior (who filed the petition in No. 28). The Examiner issued his decision on March 17, 1950 (III, 1045–1106) issuing the requested license to VEPCO and granting intervention to the Secretary, in accordance with the latter's request for reconsideration. Pursuant to a petition filed by the Secretary, the Commission reopened the hearing and additional evidence was presented in June and July 1950. The Examiner on November 15, 1950 (III, 1107–1137) filed a supplement to his earlier decision, again concluding that a license should be issued.

Exceptions to the decision of the Examiner were filed and oral argument on the exceptions was heard by the Commission. On January 26, 1951 the Commission issued its Opinion No. 204 and order adopting most of the findings and conclusions of the Examiner and issuing a fifty-year license to VEPCO (I, 41–78). Petitions for rehearing were filed by the Secretary and the REA Association but they were denied by the

Commission on March 1, 1951 (R. 6110). Petitioners seek review of these orders.

The Roanoke Rapids hydroelectric power project on the Roanoke River at mile 137 would be located a short distance south of the North Carolina-Virginia State boundary. The Commission's finding that the Roanoke River at the proposed site is a navigable water of the United States has not been questioned and is not in issue.

The Roanoke Rapids Project is estimated to cost approximately $27,000,000, with three electric generators having a total installed capacity of about 91,000 kilowatts, delivering an average of about 345,000,000 kilowatt-hours annually. The dependable capacity of an existing hydroelectric plant owned and operated by VEPCO below the proposed dam will be increased to 5,000 kilowatts. The Company will thereby have 96,000 kilowatts of additional dependable hydroelectric capacity in its public utility system. VEPCO has approximately 10,000 kilowatts of dependable capacity in several other small hydroelectric plants. It generates and distributes electric power in Virginia, North Carolina and West Virginia, operating steam-electric generating plants having dependable capacity in 1950 of about 704,300 kilowatts.

Pursuant to authorization given in Section 10 of the Flood Control Act of 1944 (58 Stat. 887, Pet. App. 22), the Chief of Engineers, United States Army, is completing construction of a

multiple-purpose project on the Roanoke River at Buggs Island, Virginia, designed principally for flood control but also providing an installation of 108,000 kilowatts of power capacity initially and 204,000 kilowatts ultimately.[2] The same paragraph in the 1944 Act authorized construction of another flood control and power project to be known as the Philpott project on a tributary of the Roanoke River, and "approved" the general comprehensive plan of development for the Roanoke River Basin recommended by the Army Engineers.

Under Section 5 of the 1944 Flood Control Act the Secretary of the Interior distributes and sells surplus electric power generated at Army flood control projects. For distribution and sale of power from those Army projects in this section of the country, including the Buggs Island and Philpott Projects, the Secretary has established the Southeastern Power Administration. In reliance upon his distributing and selling authority, the Secretary claims an interest in the Roanoke Rapids Project as a basis for his contentions in this proceeding.

The general comprehensive plan of the Army Engineers "approved" in the 1944 Act had been submitted in 1944 to the Commission for comment prior to submission to the President and Con-

[2] Recently renamed the John H. Kerr Dam.

gress. The 1944 plan (H. Doc. No. 650, 78th Cong., 2d Sess., 1944, Exh. 1 before the Commission, I, 135) superseded and modified a general plan which had been prepared some ten years earlier (H. Doc. No. 65, 74th Cong., 1st Sess., 1934). Instead of 17 developments recommended in the prior report, the Army Engineers in 1944 proposed the development of eleven sites and made other substantial changes in the prior general scheme of development for the Roanoke River Basin. The Commission advised the Chief of Engineers by letter dated May 3, 1944 (I, 138–143) that the comprehensive development of the Roanoke River Basin in general accordance with the plans proposed by his subordinates was desirable, with certain suggested modifications in the plan.

The Virginia REA Association (REA Association—petitioner in No. 29) represents eleven REA cooperatives serving areas in Virginia and selling power to some 40,000 customers. These cooperatives expect to be customers for a portion of the Buggs Island power, and upon this expectation claim an interest in the power which can be developed at the Roanoke Rapids site, in the event that site is developed by the United States. As preference customers for the output of federal plants, they claim a right to intervene in this proceeding to prevent withdrawal of the Roanoke Rapids site from what they understand as the

federal project for the river basin, and also to secure power at lower rates than they say they can obtain it from VEPCO.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners ask the Court to set aside an order of the Federal Power Commission issuing a license under the Federal Power Act to VEPCO for construction of a power dam on the Roanoke River at Roanoke Rapids, North Carolina. Congress has not adopted or authorized the Roanoke Rapids Project as a federal development or authorized appropriations for its construction. The Chief of Engineers, in line with his prior practice, recommended a general plan of development for the Roanoke River Basin but did not directly nor by any possible inference recommend that Congress preclude non-federal development under the Federal Power Act of the named sites in accordance with that general plan, except the Buggs Island and Philpott sites where federal construction was considered desirable. The issuance of the license here for non-federal development at Roanoke Rapids, one of the recommended sites, is consistent with development of the water resources of the Roanoke River Basin in full conformity with the general plan approved by Congress.

The legislative history of relevant statutes shows that Congress did not depart or intend to depart from its traditional policy when providing

for full utilization and comprehensive improvement of water resources to coordinate federal and non-federal construction wherever possible. In the present instance the water power resources available at the Roanoke Rapids site can be most effectively utilized if the power generated thereby is distributed through a large utility system. Only in such full utilization will the optimum development envisaged by the comprehensive Army plan be achieved. The preference customer market for which the petitioners desire to reserve this site cannot for many years provide the volume of power demand which is essential for full utilization of these water power resources.

In a letter dated May 3, 1944 to the Chief of Engineers the Commission concurred in the recommendations of the Corps of Engineers that the Roanoke River Basin be improved in accordance with the general plan prepared by the Corps. The Commission did not, in its letter, either directly or by inference, recommend or suggest that non-federal agencies should be precluded from the development of any water resources in the Roanoke River Basin, except the Buggs Island and Philpott developments. Furthermore, the Commission's letter to the Chief of Engineers was not a recommendation to Congress within the intendment of Section 7 (b) of the Federal Power Act. But even if it had been such a recommenda-

tion under Section 7 (b), issuance of a license seven years later was not precluded.

The Secretary of the Interior was given responsibility under Section 5 of the Flood Control Act of 1944 (58 Stat. 887) only to dispose of surplus power generated at Army reservoir projects. He was not given any responsibility for protecting any potential but unauthorized federal power development of the Roanoke Rapids site. Petitioners do not have the necessary standing to obtain court review of the Commission's order because (a) the Secretary of the Interior has no authority to appear for the United States in the capacity of *parens patriae;* (b) the interest of the Secretary of the Interior in potential but unauthorized federal power development at Roanoke Rapids is remote and not statutory; and (c) the interests of Virginia REA Association and its member cooperatives are likewise only remotely dependent upon a possible advantage to be derived by preference over certain other potential customers when power is marketed by the Secretary of the Interior.

The basic objective of petitioners in this proceeding—for the United States to produce in every area a sufficiently large block of public power for distribution through States, municipalities and REA cooperatives "to constitute an effective competitive element in the distribution of power in the area"—has not been stated by Con-

gress as its objective in any legislation, and the arguments of petitioners in support of such an objective should be addressed to Congress, not to the Court.

ARGUMENT

I. THE ROANOKE RAPIDS SITE HAS NOT BEEN RESERVED OR AUTHORIZED FOR FEDERAL DEVELOPMENT

The general power of the Commission to issue licenses under the Federal Power Act to non-federal agencies to construct power dams in the navigable streams of the country is firmly established. *United States* v. *Appalachian E. P. Co.* 311 U. S. 377; *First Iowa Cooperative* v. *F. P. C.*, 328 U. S. 152. However, the Commission recognizes certain limitations upon this general power. One limitation is imposed when Congress authorizes construction of a project by a federal agency, appropriates funds for that purpose and the agency begins construction. Under these circumstances, the effect is to preclude the Commission from granting a license for construction of that project by a State, municipality or private corporation. Cf. *Savannah River E. Co.* v. *F. P. C.*, 164 F. 2d 408 (C. A. 4), which related to the Clark Hill Project on the Savannah River. The factual situation obtaining in the Clark Hill case is markedly different from the factual situation obtaining here, since Congress has not mentioned the Roanoke Rapids Project in any legis-

lation and has not authorized any appropriation or appropriated any money for its construction and no federal agency is constructing it. Lacking any such circumstances at Roanoke Rapids, petitioners rely upon obscure language in the 1944 Flood Control Act (58 Stat. 887) to support their contention that the Commission is precluded from issuing a license for the Roanoke Rapids site.

Following established practice and pursuant to Section 7 of the Flood Control Act of 1936 (49 Stat. 1570, 1596), Section 6 of the Flood Control Act of 1938 (52 Stat. 1215, 1218), and resolutions adopted by two Committees of the House of Representatives (I, 151), the Chief of Engineers in 1944 submitted a number of reports to Congress recommending comprehensive plans for flood control and river improvement throughout the United States. One of these reports (H. Doc. No. 650, 78th Cong., 2d Sess.) related to the Roanoke River Basin and recommended the improvement of the river and its tributaries for flood control, navigation, hydroelectric power, and other beneficial uses by construction of dams and power plants at eleven selected sites (I, 136–137). The cost of each development was separately estimated and the over-all cost was estimated to be $124,000,000. Only three of the projects were multiple-purpose flood control and power—the other eight being straight power projects.

Petitioners rely upon Section 10 of the Flood Control Act of 1944, the opening paragraph of which reads as follows (58 Stat. at 891):

> SEC. 10. That the following works of improvement for the benefit of navigation and the control of destructive flood waters and other purposes are hereby adopted and authorized in the interest of the national security and with a view toward providing an adequate reservoir of useful and worthy public works for the post-war construction program, to be prosecuted under the direction of the Secretary of War and supervision of the Chief of Engineers in accordance with the plans in the respective reports hereinafter designated and subject to the conditions set forth therein: *Provided,* That the necessary plans, specifications, and preliminary work may be prosecuted on any project authorized in this Act to be constructed by the War Department during the war, with funds from appropriations heretofore or hereafter made for flood control, so as to be ready for rapid inauguration of a post-war program of construction: *Provided further,* That when the existing critical situation with respect to materials, equipment, and manpower no longer exists, and in any event not later than immediately following the cessation of hostilities in the present war, the projects herein shall be initiated as expeditiously and prosecuted as vigorously as may be consistent with budgetary requirements: *And provided fur-*

> *ther,* That penstocks and similar facilities adapted to possible future use in the development of hydroelectric power shall be installed in any dam authorized in this Act for construction by the War Department when approved by the Secretary of War on the recommendation of the Chief of Engineers and the Federal Power Commission.

The opening paragraph was followed by fifteen pages relating to flood control and river basin developments on practically every important stream in the country as recommended in various reports of the Chief of Engineers.

A. THE "WORKS OF IMPROVEMENT" WHICH THE INTRODUCTORY PARAGRAPH OF SECTION 10 "ADOPTED" AND "AUTHORIZED" FOR POST-WAR CONSTRUCTION WERE THOSE "AUTHORIZED FOR APPROPRIATION" LATER IN THE ACT

The principal claim of petitioners that the Commission was precluded from licensing the Roanoke Rapids site for non-federal development depends factually upon the inclusion in Section 10, under the subheading "Roanoke River Basin" of a short clause "approving" a comprehensive plan for development of the Roanoke River Basin (which included that site). From that fact petitioners claim that the introductory paragraph's adoption and authorization of "the following works of improvement" committed the United States to the development of the Roanoke Rapids site and precluded the licensing thereof for non-federal development.

The language of the Roanoke River paragraph, however, shows that, while giving its approval to the comprehensive plan for development of the Roanoke River Basin, Congress did not adopt it in its entirety for federal construction, but, on the contrary, authorized construction of only the two principal flood-control projects, Buggs Island and Philpott. The Roanoke River paragraph reads:

> *Roanoke River Basin.—The general plan* for the comprehensive development of the Roanoke River Basin for flood control and other purposes recommended by the Chief of Engineers in House Document Numbered 650, Seventy-eighth Congress, second session, *is approved* and the *construction* of the Buggs Island Reservoir on the Roanoke River in Virginia and North Carolina, and the Philpott Reservoir on the Smith River in Virginia, are hereby *authorized* substantially in accordance with the recommendations of the Chief of Engineers in that report at an estimated cost of $36,140,000. [Emphasis supplied.]

The "works of improvement" named in this paragraph (Buggs Island Reservoir and Philpott Reservoir), whose "construction" was "authorized" "at an estimated cost of $36,140,000," were the ones intended to be "adopted and authorized" by the opening paragraph of Section 10 and the only ones intended to be so adopted and authorized. By the introductory paragraph "the fol-

lowing works of improvement" were "adopted and authorized * * * to be prosecuted under the direction of the Secretary of War" in order to provide a reservoir of public works for a post-war construction program. It was further specified that preliminary work might be prosecuted *during the war* "on any project authorized in the Act to be constructed by the War Department * * * so as to be ready for rapid inauguration of a post-war program of construction." Finally, it was provided that after the war those projects authorized should "be initiated as expeditiously and prosecuted as vigorously as may be consistent with budgetary requirements."

Roanoke Rapids was not a "work of improvement"

Thus the "works of improvement" which Congress intended to adopt and authorize were variously referred to in Section 10 as (1) "the following works;" (2) those "authorized in the Act to be constructed by the War Department;" (3) ones which were to be initiated after the war as expeditiously "as may be consistent with budgetary requirements." Roanoke Rapids could not have been spoken of in any of those ways, much less in all three:

(1) It was not among the works expressly named under 38 subheadings. It was one of eleven dams in the comprehensive plan which was approved under the subheading "Roanoke River

Basin," where two of the other dams were expressly authorized to be constructed. But the introductory paragraph did not "adopt and authorize" works "described in the following approved plans," or use any comparable language.

(2) Roanoke Rapids was not a work which was "authorized to be constructed by the War Department" because such authorization was given only for Buggs Island and Philpott in the Roanoke River Basin. The necessity for authorization such as was given for those two dams (authorization of construction at a stated cost or authorization for appropriation), and the necessity for appropriation of funds, before federal development of the other nine sites could begin, is admitted by petitioners (Pet. Br. 131, 145, 160, 203, 242 and Pet. App. 183).[3]

(3) Construction of Roanoke Rapids could not be "initiated," either expeditiously or otherwise, "consistent with budgetary requirements" because, again, no appropriation had been au-

[3] "Petitioners never argued that the [approved] plan was 'authorized for construction'" (Pet. Br. 131), although they state that the term "adopted and authorized" "means that all of the units are adopted, but for only some are appropriations authorized" (Pet. Br. 145). Petitioners list Roanoke Rapids Project as a plant "for which appropriations are not yet authorized" (Pet. App. 183), and also state that "appropriations have not yet been authorized" for the Roanoke Rapids Project (Pet. Br. 203, 242).

thorized and until that was done[4] "budgetary requirements" could not apply. Although contending that in this proviso in the introductory paragraph of Section 10 Congress "directed that after the war 'the projects herein' (not merely those authorized in this Act to be constructed) shall be initiated and prosecuted" (Pet. Br. 146, 109), petitioners admit that. Congress did not place the Roanoke River Project in the category of those that can be so initiated and prosecuted by flatly stating that no appropriations have been authorized for its construction (Pet. Br. 203, 242, Pet. App. 183) and that they have never argued that it was authorized for construction (Pet. Br. 131).

Commission's interpretation gives meaning to statute

Furthermore, this interpretation does not leave the words "adopted and authorized" in the introductory paragraph of Section 10 "ineffective and meaningless," as the petitioners argue (Pet. 34,

[4] Rules of House of Representatives, Rule XXI, H. Doc. No. 739, 81st Cong., 2d Sess.; Senate Manual, Standing Rule of the Senate No. XVI, S. Doc. No. 5, 82d Cong., 1st Sess. See also S. Rep. No. 1167, 80th Cong., 2d Sess., pp. 6–7, and S. Rep. No. 361, 81st Cong., 1st Sess., p. 10, both of which referred critically to requests for appropriations for "unauthorized" projects and declined to approve such appropriations. Substantially the same rules were effective in 1944; H. Doc. No. 812, 77th Cong., 2d Sess., Rule XXI, par. 385, p. 384, and S. Doc. No. 239, 77th Cong., 2d Sess., Rule XVI, p. 20.

Pet. Br. 128–129).[5] For one thing, those words have the effect of assigning certain responsibilities to the Secretary of War and Chief of Engineers for construction and supervision of the works authorized for construction. For another, they state the purpose of the section: "adopted and authorized *in the interest*" of providing a reservoir of public works for a post-war construction program. For another, the works are "adopted and authorized" with the proviso that preliminary work can be prosecuted during the war.[6] For yet another, the last proviso in the introductory paragraph, with respect to the installation of power penstocks when approved by the Secretary of War upon the recommendation of the Chief of Engineers and the Commission, is, by the "adopted and authorized" clause, attached to all of the works "authorized for construction" in the Act, and of course petitioners do not claim that Roanoke Rapids was authorized for construction (*supra*, 17, n. 3).

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[5] Except in the section of this brief discussing the claims of the REA Association in No. 29, *infra*, 132, references herein to the petition and briefs of petitioners are to the petition and briefs filed in No. 28, which have been adopted by the REA Association in No. 29.

[6] Preliminary work was prosecuted by the Chief of Engineers for the Buggs Island Project by the preparation of a "Definite Project Report" (or planning report) giving details of design (Exh. 10, R. 3653). Except for the Philpott Project, no such preliminary work has been carried on by the Army for any of the other named projects in the Roanoke River Basin.

None of these things is provided by any other part of the 1944 Act. And perhaps as important was the Congressional purpose to have prepared and approved plans to guide the Commission in considering the adaptability of projects proposed for licensing to comprehensive development of water resources, as required by Section 10 (a) and 4 (e) of the Federal Power Act. Also, such plans assist Congress in its consideration of legislation dealing with water resource development.

This interpretation of Section 10 is supported by the legislative history (*infra*, 26) and makes irrelevant much of the argument in petitioners' briefs. Thus the question which is argued at length, as to what the words "adopted and authorized" in the introductory paragraph mean (Pet. Br. 123–139, 143–146, 148–150) is irrelevant to the present issue, for under this interpretation those words, whatever their meaning, do not apply to Roanoke Rapids, but only to Buggs Island and Philpott, in the Roanoke River Basin.

Petitioners contend that the Congressional approval of the comprehensive plan in Section 10 under the subheading "Roanoke River Basin" would have been absurd if it did not mean that federal development of the works which were encompassed within that plan was entered upon, to the exclusion of all licensed non-federal de-

velopment.[7] There are at least two manifest functions of such approval, however, which give it a perfectly natural meaning and at the same time reserve for Congress complete freedom of later decision to authorize or not to authorize any of the named projects in the approved plan. Such approval crystallized the scheme of development for the Roanoke River Basin for both the Army Engineers and the Federal Power Commission.

Congress has provided that when formal planning reports are submitted by the Army engineers to Congress under appropriate authorization no additional report or estimate shall be submitted unless authorized by law or by resolution of an appropriate committee (e. g., § 6, Flood Control Act of 1936, 49 Stat. 1570, 1592). Another effect of the Congressional approval of the eleven dam plan, particularly in the light of the Army's earlier 17 dam plan (H. Doc. No. 63, 74th Cong., 1st Sess.), was to make it available for reference by the Federal Power Commission in determining whether any project in the Roanoke River Basin for which a license may be sought is, within the meaning of Section 10 (a) of the Federal Power Act, "best adapted to a comprehensive plan for

[7] Petitioners used the phrase "when Congress takes over a project" (Pet. Br. 123) and "when the government is deemed to have entered upon a development" (Pet. Br. 126) in discussing nine steps by which they test a federal undertaking.

improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce" and for other beneficial public purposes (*infra*, 75).

Previous withdrawals of licensing authority have been explicit

The court below noted (V, 35) that where Congress has intended to withdraw all sites in a general plan from the licensing power of the Commission without committing the United States to their development Congress has done so "plainly and explicitly" as in the 1928 Boulder Canyon Project Act (45 Stat. 1057, 1062) and in the case of Potomac River Basin (45 Stat. 1012). Another similar ban removed projects in national parks and national monuments from the Commission's licensing authority by an amendment to the Federal Water Power Act (41 Stat. 1353). While Congress, of course, is not limited to any one particular mode of expression, nevertheless the change in federal policy which is so strongly urged by the petitioners here would strip the Commission of a substantial part of its control over water power development on the important rivers of the country. If Congress had so intended, it would have said so expressly and not by implication or indirection.

Although petitioners deny any contention that there was a repeal of the licensing authority of

the Commission by the provisions of Section 10 of the 1944 Flood Control Act, nevertheless they say that if the provisions of the Federal Power Act are not reconcilable with those of the 1944 Act, the latter statute must be held to supersede the earlier one (Pet. Br. 168), which argument connotes repeal by implication. This contention of petitioners is predicated upon an argumentative interpretation as to the meaning of words of general applicability in Section 10 of the 1944 Act, and supersedure in this respect can only mean repeal by implication, which of course will be found only where the implication is clear.[8]

The Commission's interpretation is consistent with rules of statutory construction

The court below, by way of an additional support for its interpretation of Section 10, applied the rule of statutory construction that "The general language of a statute will not be held to apply to a matter specifically dealt with" to show that the introductory paragraph's general provisions speak only by referring to the words authorized for appropriation or for construction in the specific provisions which follow (V, 34).

[8] *F. T. C.* v. *A. P. W. Paper Co.*, 328 U. S. 193, 202; *United States* v. *Jackson*, 302 U. S. 628, 631; *United States* v. *Tynen*, 11 Wall. 88, 92; *United States* v. *California*, 297 U. S. 175, 188; *Posadas* v. *National City Bank*, 296 U. S. 497, 503; *Cf. H. Rouw Co.* v. *Crivella*, 105 F.2d 434, 436 (C. A. 8).

It is apparent from the analysis herein of the general and specific provisions of Section 10 that the lower court's decision by no means was dependent upon that rule of statutory construction.

In contrast, petitioners say that the court was there disregarding some of the general provisions which must be construed as applicable to the specific provisions in order to give meaning to both paragraphs (Pet. Br. 158–164). To illustrate an infirmity in this reasoning of the lower court, petitioners refer (Pet. Br. 161–162) to the only two works of improvement which are described in the six Flood Control Acts since 1936 as having been "adopted," the Denison Reservoir on the Red River and the Flood Control Project on the Lower Mississippi River, both of which are in Section 4 of the Flood Control Act of 1938 (52 Stat. 1215, 1219–1220).

Adoption is not authorization

However, Congress specifically not only "adopted" but "authorized" the Denison Reservoir and an additional appropriation for the Lower Mississippi River Flood Control (Pet. Br. 162), so that the "adoption" of these two projects was implemented by their authorizations in the same manner as all other projects undertaken by Congress for federal development.

Furthermore, these two illustrations, the Denison Reservoir and the Lower Mississippi Flood Control Project, were not exceptions to uniform practice of Congress expressly to "authorize" those plans and those projects which it desires "to be prosecuted under the direction of the Secretary of War" (Pet. Br. 163–164). In other words those works of improvement whether in comprehensive plans or in individual projects, which have "been adopted by law" have in each instance been "authorized for construction" or "authorized for appropriation."

Congress has frequently authorized the construction of all of the projects listed in a comprehensive plan of river improvement, but it has done so in clear language. For instance, under the subheading "Upper Mississippi River Basin" Congress in the 1944 Act (58 Stat. at 896), in addition to previous authorizations "authorized the appropriation of the sum of $10,000,000 for the prosecution of the comprehensive plan approved in the Act of June 28, 1938 for the Upper Mississippi River Basin" (Pet. App. 24). The lower court referred to the difference between this authorization "for the prosecution of the comprehensive plan" as pointing to the distinction in the Roanoke River Basin Plan where Congress merely "approved" that plan and "authorized" only the Buggs Island and Philpott Reservoirs (V, 35).

B. LEGISLATIVE HISTORY SUPPORTS THE COMMISSION'S INTERPRETATION

Confirmation that Congress intended to limit itself only to developing Buggs Island and Philpott, of the Roanoke River Basin works, appears in the legislative history of the relevant statutes. As noted by the lower court, such flood control legislation is no haphazard matter but is handled by Congress through experienced committees with long continuity of service, having in charge long-range programs of development, and being constantly in touch with the agencies charged with carrying out the programs (V, 35). The Senate committee reporting the Roanoke River Basin item stated (S. Rep. No. 1030, 78th Cong., 2d Sess.):

> The Committee recommends approval of the comprehensive plan and *authorization and construction* of the Buggs Island and Philpott Reservoirs in accordance with the recommendation of the Chief of Engineers. [Emphasis supplied.]

There is a complete absence from this report or any other committee report of any intimation of a purpose to commit the United States to develop Roanoke Rapids, or any of the nine other unauthorized dams in the comprehensive development covered by the plan as approved.

Twice Congress has considered legislation in a manner inconsistent with petitioners' claims that the nine Roanoke River Projects not specifically

authorized were adopted and authorized as federal projects because embraced in the general comprehensive plan approved. Once, Congress refused to authorize construction of the Smith Mountain Project on a tributary of the Roanoke River, and in the second instance it authorized construction of the Hartwell Project on the Savannah River.

Smith Mountain Project

Two bills were introduced in 1949 in the 81st Congress (H. R. 3250 and H. R. 3416) to authorize the Smith Mountain Project which was included in the Roanoke River Basin approved plan, and was the only project in addition to the Buggs Island and Philpott developments which would provide any flood control benefits, the remaining projects being considered straight power projects (Pet. App. 147, 162). The Smith Mountain Project, after Committee consideration, was omitted from the omnibus bill (H. R. 5472) subsequently reported by the House Committee and enacted into law as the Flood Control Act of 1950 (64 Stat. 163).

During hearings before the House Committee on Public Works in 1949, Acting Chairman Davis brought up the bills to authorize the Smith Mountain Project and stated (Pet. App. 143–144):

> I am informed that in view of discussion on the Clark Hill project yesterday and

the Hartwell—it is expected that the eight or nine dams for power purposes in the Savannah River are very likely to be utilized by private industry and I think Mr. Dondero should get some satisfaction out of this, and I say that with all deference to everybody concerned. If the Federal Government is under obligation to assume a greater share of the expense in providing for a multipurpose service up the river, then after that has been done, down the river, say in these 9 cases, private industry could then come in and build the power establishments to take care of the needs of that area, I think we are getting somewhere. And that was developed, Mr. Dondero in the statements yesterday, when the first two projects, Clark Hill and Hartwell are developed, the excess cost maintained by the public at large provides an opportunity for private industry to go ahead and proceed in an orderly way under our system of private enterprise.

The Army Engineer spokesman, Col. Gee, then proceeded (Pet. App. 147–148):

Mr. Chairman, I would like to point out at this time that the authorizing of construction on the Smith Mountain project represents a deviation from the original recommendations of the Chief of Engineers when this basin plan was authorized. The reason for that deviation, as I have previously inferred, is that it is the third

project in the basin involving flood control, the remaining eight being straight power projects and produce no other benefits.

Since the development of Buggs Island has begun, a private utility company has filed an application with the Federal Power Commission to develop the Roanoke Rapids project. This development of the Roanoke Rapids project is to be exactly in accordance with the project as recommended by the Chief of Engineers in this document. The hearings were conducted by the Federal Power Commission last week on that application. We have no information as to the outcome of those hearings. That project was the third project recommended in the original report of the Chief of Engineers.

The fourth project, the Gaston, it is believed that a private utility company will file an application for the construction of that project in the near future.

* * * * *

Col. GEE. We would be remiss in our duty as engineers serving the Congress if we did not point out to you the potentialities of the Roanoke River Basin. We have said in the report that the building of three of these 11 projects will produce all of that flood control which we believe to be economically justified, that the remaining 8 are straight power projects, and if it is desired that power projects be built by the federal government, we believe

these are the sites best adapted to that purpose, and this is approximately what it will cost to develop the full capabilities of that river basin.

One of the committee members, Representative Angell, asked if the Federal Government at the present time was "planning to develop any of those dams on the lower part of the river which are devoted exclusively to power production," and Col. Gee replied (Pet. App., p. 161):

> No, sir. They have the same status in this basin plan as the eight remaining projects. They are part of the approved plan. Their being in that plan certainly is no bar to a private utility company coming in and seeking to develop one of these projects.
>
> Mr. ANGELL. And that is what is being done now?
>
> Col. GEE. That is being done now at Roanoke Rapids, sir.[9]

Hartwell Project was separately authorized

Of further significance was Congressional action in connection with the Savannah River, for which the 1944 Flood Control Act "approved" a general plan of development and "authorized" only the Clark Hill Project among others in the plan in language exactly corresponding with that used for the Roanoke River Basin (Pet. App. 23).

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[9] Hearings on H. R. 5172, House Comm. on Public Works, pp. 137–144, 81st Congress (1949), Pet. App. 147, 160–161.

A bill was introduced in 1949 in the 81st Congress to authorize the Hartwell Project on the Savannah River, which, like Roanoke Rapids was included in the general plan approved in the 1944 Flood Control Act but not specifically mentioned by Congress. Authorization for its construction was carried in the 1950 Flood Control Act (64 Stat. 163, 167) and Hartwell is now under construction.

In testifying before the Committee with respect to the Hartwell project on the Savannah River, Lt. Col. Gee, representing the Board of Engineers, said (Pet. App. 136–137):

> Col. GEE. The project is a part of the approved plan, sir.
>
> The CHAIRMAN. What do you mean by that to say, let us understand what you mean. Is not the word "approved" an authorization for the plan without appropriation, or without an authorization for the appropriation? What is the difference between approving and authorizing a plan?
>
> Col. GEE. We have never construed the approval of the plan to carry with it the authorization to construct the elements of that plan.
>
> The CHAIRMAN. Nor do we. * * *

Thus Congress recognized that projects in approved plans were not by such approval authorized or taken over for federal development.

However, when the 1949 omnibus bill, H. R. 5472, was reported out by the House Committee it contained the following sentence:

> There is hereby authorized to be appropriated the sum of $40,000,000 for the construction of projects in the general plan for the comprehensive development of the Savannah River Basin * * *.

This language was somewhat along the line of reasoning suggested by Petitioners in this proceeding that the 1944 "approval" of the general plan was "authorization" of all of the projects named therein. However, contrary to their argument, the Committee (H. Rep. No. 969, pp. 88–89) made it clear that this authorization was solely for the construction of the Hartwell project, and a Committee amendment was offered and adopted on the House floor to have the provision read:

> There is hereby authorized to be appropriated the sum of $40,000,000 for construction of the Hartwell project in the general plan for the comprehensive development of the Savannah River Basin, approved in the Act of December 22, 1944, in addition to the authorization for project construction in the Act of December 22, 1944.[10]

Chairman Whittington of the House Committee stated that the change was "a clarifying amend-

[10] Retained in bill as passed, Act of May 17, 1950, 64 Stat. 163, 167.

ment to make certain and definite that this authorization just refers to that project and no other." [11] The purpose of the Hartwell authorization suggested by petitioners (Pet. Br. 131), to continue the Savannah River development after completion of the Clark Hill Project, could as readily have been accomplished by the language first reported out by the Committee. They fail to explain the necessity for authorizing construction of the Hartwell Project as carried in the 1950 statute nor the statement of Chairman Whittington, if Hartwell was authorized in 1944.

Committees understood difference between "approval" of plan and "authorization" of project

It appears from the above and the balance of the discussion during the hearings before the House Committee on these bills (Pet. App. 126–179), that at least the members of this experienced Committee not only understood the difference between the prior "approval" of the general

[11] 95 Cong. Rec. 11975. Contrary to the argument of petitioners in this Court, when on Feb. 13, 1951, Administrator Creim of the Southeastern Power Administration was asked by a House Appropriations Subcommittee what projects are now authorized, he listed for the Roanoke and Savannah River Basins only the Buggs Island, Philpott, and Clark Hill projects, *his list being taken from the appropriation justifications submitted by the Secretary of the Interior* (Hearings, Interior Department Appropriations for 1952, p. 110). Mr. Creim, of course, correctly advised the Committee, even if he did not support the Secretary in his argument here.

plans for the Roanoke and Savannah Rivers and authorization of projects included therein but were well aware of and favorable to the possibility that non-federal interests might secure licenses under the Federal Power Act to construct those power projects which were carried in the approved plans and which had not been authorized for federal construction. Had the Committee been of the opinion that the sites proposed for development in the general plan were reserved for federal construction or that they should be reserved for federal construction, a simple clause in the bill which they were then considering would have been sufficient to insure that result. This was not done, of course, and no bill has been introduced in Congress to either authorize federal construction at the Roanoke Rapids site or to reserve that site for federal construction.

Petitioners expressed doubt that the House Committee was thoroughly advised of the position being taken by the Federal Power Commission as to the meaning of Section 10 of the 1944 Act (Pet. Br. 203–206), notwithstanding the statements by Col. Gee that hearings had been held by the Commission on the Roanoke Rapids application and that the application was being considered (Pet. App. 137, 161–168) and notwithstanding the statements by Acting Chairman Davis of the House Committee that "it is expected that the eight or nine dams for power purposes in the Savannah

[sic] River are very likely to be utilized by private industry" (Pet. App. 143–144). As shown by the record before the Court, the hearing on the Roanoke Rapids application was on the merits of that proposal. On the other hand objection to the issuance of a license for the Clark Hill Project was raised initially by the Commission and decided against the applicant power company because the Commission believed it lacked jurisdiction. *Savannah River E. Co.* v. *F. P. C.*, 164 F. 2d 408 (C. A. 4). Therefore, even at the time of the 1949 hearing before the House Committee, the Commission had not questioned initially its authority to consider the application of the Roanoke Rapids Project as it had questioned initially the application for the Clark Hill Project.

The Senate, where the Roanoke River Basin paragraph originated, had the same understanding as to what facilities were being authorized in the 1944 bill. In discussing the Roanoke River Basin improvements in hearings before the Senate Committee on Commerce, Chairman Overton mentioned the Buggs Island and Philpott reservoirs and this colloquy followed:[12]

> Senator OVERTON. Are those the only two reservoirs that are recommended to be authorized in this bill?
>
> Colonel GOETHALS. Those are the only two recommended to be authorized in this

[12] Hearings on H. R. 4485, Senate Committee on Commerce, May 1944, 78th Cong., 2d Sess., p. 24. See Pet. App. 102–107.

> bill. The report recommends that Congress approve the general plan of development, but at this time authorize only those two reservoirs in the amount stated.

The Senate Committee report on the bill (which petitioners fail to quote, Pet. Br. 107) states: "The Committee recommends approval of the comprehensive plan and authorization for construction of the Buggs Island and Philpott Reservoirs in accordance with the recommendation of the Chief of Engineers."[13] There was no mention by either the House or Senate Committees of any adoption or authorization of any other projects in the Roanoke River Basin.

Flood Control Acts are not power distribution statutes

During the Senate hearings, after Colonel Goethals had referred to the possibility of producing power at the proposed projects, Chairman Overton stressed the role of Congress in providing flood control but questioned federal construction of single-purpose power projects (Hearings, *ibid.*, p. 29):

> It is my off-hand opinion that we would not be justified in authorizing a project purely for power. It must have as a foundation flood-control benefits in some substantial amount. What have you to say about that, General Reybold?

[13] S. Rep. No. 1030, 78th Cong., 2d Sess., June 22, 1944, on H. R. 4485.

General REYBOLD. We do have flood-control benefits in important amounts in these initial projects on the Roanoke and Yadkin-Pee Dee Rivers.

Senator OVERTON. Yes; you have it. I think there should be a statement of the extent of the flood control benefit. A very serious question presents itself, for our Congress to construct a dam solely for the purpose of power, that has no relation to flood control or navigation.

Later Chairman Overton said (Hearings, *ibid.*, p. 31):

I think, however, that every project in this bill or any other authorized bill, should have as part of its basis a substantial benefit resulting from flood protection, and for that reason I think, in the estimating of benefits, the benefits to be derived from flood control should be estimated, and, as Senator Burton has pointed out, should be separately estimated, so that Congress can more intelligently pass upon it.

Chairman Whittington of the House Committee reflected the same intention of sticking to flood control when the bill was under debate in the House of Representatives, although at that time the Roanoke River Basin was not included. He said (90 Cong. Rec. 4122):

The Committee on Flood Control has adhered to the policy of reporting bills and reporting projects where the dominant interest is flood control. It often appears

> that navigation, irrigation, or power is involved. Provisions are made for their development. Differences of opinion in executive departments as to the dominant interests respecting a few of the projects included in the bill exist. All interests were heard, and only those projects where the preponderance of the testimony showed that flood control was paramount are contained in the pending bill.

Later on, Chairman Whittington repeated his understanding that the dominant purpose of the bill was for flood control (90 Cong. Rec. 4199, 4202):

> There are no facilities and no power projects authorized in this bill. The general law will obtain. If a reservoir is authorized and if the Federal Power Commission thinks that a penstock should be installed, and the Secretary of War agrees with it, there will be a penstock installed in the reservoir. But no power project is authorized in the bill.
>
> * * * * *
>
> In further answer to the gentleman's question, we have repeatedly stated during the debate that no project, reservoir, or dam, or other improvement is embraced in this bill unless it is primarily for flood control. If power can be developed as an incident, or if reclamation can be provided, they are cared for in the bill.
>
> * * * * *

> Under leave to extend, as I stated, none of the dams authorized in the pending bill provide primarily for the generation and distribution of power. The dominant interest in all of the dams is flood control. Such has been the case in previous flood-control bills.

Congress has applied the term "project" to individual dams and facilities as well as to groups of dams and facilities within a river basin plan. Although there is no uniformity in such usage, each situation being dealt with for particular purposes regardless of the number of units in a "project", petitioners contend that the Roanoke River Basin plan called for a "project" having 11 dams and therefore the removal of the Roanoke Rapids dam or unit from the basin project by the issuance of a license to VEPCO should not be permitted to disrupt the comprehensive plan (Pet. Br. 104, 112–114, 171–173). There would be no disruption of the comprehensive plan if some or all of the remaining projects in the Roanoke River Basin are constructed under Federal Power Act licenses (*infra*, 43).

In the first place, the Roanoke River paragraph in Section 10 of the 1944 Flood Control Act does not refer to a "project" either in giving approval to the general plan for comprehensive development or in authorizing the Buggs Island and Philpott Reservoirs (*supra*, 15). In the second place

there is not the slightest evidence that either Congress or the Army Engineers who prepared the general plan attached peculiar significance to the term "project" as applied to the Roanoke River Basin improvements, either separately or collectively. It will be noted above that Chairman Whittington referred to "dams" rather than "projects."

General plan furnished basis for decision by Congress

Moreover, even if the language of Section 10 authorizing the Buggs Island and Philpott reservoirs is ignored, it is clear that Congress did not intend by approving the general plan of the Army Engineers for the entire Roanoke River Basin to reserve development of the eleven named sites to the United States in order to insure comprehensive utilization of those water resources. The Army report relied upon by Congress for improving the basin (H. Doc. 650, I, 135) proposed eleven dams which as then estimated would have cost the United States $124,000,000 if constructed as proposed. Since all of the eleven dams were on an equal plane of evaluation, Congress could decide which ones, if any, best justified the expenditure of federal funds. The Buggs Island and Philpott dams were said by the Army Engineers to be recommended for federal construction because they were "advantageously located to supply energy to partially meet" the load in the in-

dustrial areas contiguous to the Roanoke River Basin and "provide the major portion of all flood control of the entire comprehensive plan" (I, 146). The estimated cost for Buggs Island was given as $31,490,000 (I, 158), although it has actually cost about $85,000,000.

But the Buggs Island and Philpott projects having been constructed, there is no assurance that any of the other dams and reservoirs proposed for the basin will ever be built by the United States. Two of them, Randolph and Schoolfield, were reported to have anticipated benefits of less value than their cost, the ratios being 0.96 and 0.84, respectively (I, 145). One other, Smith Mountain, for which less than two per cent of the benefits were estimated to be for flood control,[14] had a benefit-to-cost ratio of 1.04 according to the 1944 report (I, 144), or very closely in balance. Where the benefits are estimated by the Army Engineers at less than the cost, the projects are not recommended for appropriations, even if construction has been authorized and definite construction costs have been determined (Pet. App. 154).

Even where the benefit-to-cost ratio is favorable, it is necessary to dispose of the electric power in order to recoup the power investment and this calls for a power market within economic

[14] Or $10,000 out of a total of $604,800 of annual benefits (I, 144).

transmission distance. Accordingly, when the Commission reported upon the Army proposal to authorize the Buggs Island and Philpott projects, it said that its studies showed that the power from those plants "could be absorbed and profitably utilized in the post-war period within a reasonably short time following their construction" and recommended their construction in the early post-war period (I, 142). No such recommendations were submitted either by the Commission or by the Army Engineers for any of the nine other projects in the basin, and even the power output of these two plants was not predicted for absorption until after the war (I, 142). Consequently, when Congress stated in the introductory paragraph of Section 10 of the 1944 Act that it was creating a reservoir of *useful* public works for the post-war period, it had ample justification for authorizing both the Buggs Island and the Philpott projects because they would be useful for flood control and their power output could be absorbed. But Congress had absolutely no basis upon which it could decide whether to authorize any of the other nine developments then or later. Therefore, in order to call a halt to further surveys in this river basin, it approved the general plan, authorized those two, and dropped the matter for the time being.

Non-federal construction is consistent with comprehensive development

Not only has this Court affirmed the applicability of the licensing provisions of the Federal Power Act to non-federal agencies, *United States* v. *Appalachian E. P. Co.*, 311 U. S. 377, *First Iowa Cooperative* v. *F. P. C.*, 328 U. S. 152, and thereby recognized an established basis for licenses, but Congress has, since enactment of the original Power Act in 1920, consistently recognized and encouraged the extension of those license provisions to non-federal agencies for comprehensive water resources development. In 1925 Congress directed the Secretary of War and the Commission jointly to prepare and submit a list of streams on which comprehensive surveys should be undertaken and a list of the purposes for which improvements should be proposed.[15] The resultant list of streams and purposes for which they should be improved was presented in 1926 as House Document No. 308, 69th Cong., 1st Sess. The subsequent comprehensive survey reports are given the popular name of "308 Reports" because they follow the recommendations made in H. Doc. No. 308 and cover all possible water improvements for public purposes.

The 1926 report not only lists the purposes and streams to be covered by the surveys but makes

[15] Act of March 3, 1925, § 3, 43 Stat. 1186, 1190.

it clear that the improvements were not to be restricted to the Federal Government, for it says:

> There are evidently two principal purposes for which investigations of this nature would be useful, either for the preparation of plans for improvement *to be undertaken by the Federal Government alone or in connection with private enterprise,* or to secure adequate data *to insure that waterway development by private enterprise would fit into a general plan for the full utilization of the water resources of a stream.*
>
> * * * * *
>
> Investigations of the type for which estimates are submitted should, therefore, it is believed, be first given to streams on which it appears there is a possibility of the Federal Government's undertaking, either alone *or in connection with private interests,* construction work for the improvement of the streams.
>
> * * * * *
>
> 8. Investigations of the type for which estimates are submitted should therefore, it is believed, be first given to streams on which it appears there is a possibility of the Federal Government's undertaking *either alone or in connection with private interests,* construction work for the improvement of the stream. These surveys should evidently be made by the agencies which

> are to be entrusted with the construction work: in the case of navigation and flood control the War Department, and in the case of irrigation projects the Department of the Interior. Judging from past experience of this department, it may be that where a combined power and navigation project appears feasible, there is a very fair possibility that the investigations of the power values and possibilities may in many cases be obtained without cost on the part of the United States by private interests interested in securing the power. [Emphasis supplied.]

The streams listed by the Chief of Engineers and the Commission were divided into three classes: (a) streams where navigation improvements justify the Federal Government sharing in the cost of the improvements; (b) streams where large expenditures by the Federal Government do not appear to be warranted; and (c) streams upon which the apparent benefits to navigation that could be derived from power developments would be insignificant and where the cost would be borne by non-federal developers (Pet. App. 65). The recommended surveys were to be basin-wide in order to determine "the general scheme best adapted to comprehensive utilization of the water resources" for all purposes. Congress approved the 1926 report by authorizing "surveys in accordance with House Document Numbered 308,

69th Cong., 1st Sess.," and adding a number of streams to the list.[16] The Roanoke River was listed in the original report, H. Doc. No. 308.

The concept of comprehensive river basin development, providing for both federal and non-federal construction, recognized in the Federal Power Act and implemented in H. Doc. No. 308, has not been substantially changed either in administrative action or interpretation by the Army Engineers or the Commission or changed in subsequent legislation by Congress. That concept finds practical application in the requirement in Section 10 (a) of the Federal Power Act that the Commission shall approve only those water power projects which in its judgment are best adapted to comprehensive plans for developing a waterway or waterways for the use or benefit of commerce, for the improvement and utilization of water-power development, and for other beneficial public uses, including recreational purposes, and to achieve these ends the Commission may require modification of project plans.[17] This Court has

[16] Act of Jan. 21, 1927, 44 Stat. 1010, 1015. From this time up to 1936 when the first general flood control act was adopted, the Army Engineers surveyed and reported to Congress upon some 200 river basins at a cost of about $11,000,000, substantially covering the nation (Hearings, Senate Committee on Commerce, 74th Cong., 2nd Sess., on H. R. 8455, pp. 2-4).

[17] Prior to 1935 the wording in Section 10 (a) was slightly different and required a proposed project to be, in the judgment of the Commission, "best adapted to a comprehensive

already noted the intention of Congress to secure through these license provisions a comprehensive development of national resources and not merely to prevent obstructions to navigation. *First Iowa Coop.* v. *F. P. C.*, 328 U. S. at pp. 180–181.

C. THE ARMY ENGINEERS AND OTHER FEDERAL AGENCIES HAVE CONSISTENTLY RECOGNIZED THE POLICY OF NON-FEDERAL PARTICIPATION IN COMPREHENSIVE RIVER IMPROVEMENT

In addition to contending that Congress intended to improve the Roanoke River Basin as a "single package" under the approved Army plan, petitioners say that the Chief of Engineers "did not submit 11 separate projects" for such submittal would not have complied with the law (Pet. Br. 104, 139, 173). But the "single package" doctrine of river basin improvement advanced by petitioners cannot be supported by or derived from the recommendations of the Chief of Engineers for improvement of the Roanoke River Basin.

Since Section 10 (a) of the Power Act calls for Commission consideration of comprehensive river plans before it may authorize a license, it works closely with the Army Corps of Engineers, whose river basin investigations are still conducted as recommended in H. Doc. No. 308 and recommend comprehensive stream improvements regardless of

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scheme of improvement and utilization for the purposes of navigation, of water power development, and of other beneficial public uses" (41 Stat. 1063, 1068). Prior to 1935 the Act was known as the Federal Water Power Act.

of the party undertaking the construction. In recent years both the Chief of Engineers and the Commission, as members of the Federal Inter-Agency River Basin Committee,[18] have been cooperating with other federal agencies, including the Department of the Interior, in river basin planning. No suggestion has been made by this Committee that single purpose water power sites should be reserved exclusively for federal development as petitioners now suggest the Chief of Engineers proposed for the Roanoke River Basin.

Petitioners say that the Army comprehensive survey reports are published as Congressional documents *if they recommend federal construction* (Pet. Br. 124). The first survey report on the Roanoke River Basin submitted in 1934 proposed 17 dams but did not recommend federal construction of any. It was published as H. Doc. No. 65, 74th Cong., 1st Sess.

Petitioners also say that the subsequent report submitted in 1944, H. Doc. No. 650 (I, 135), upon which Congress acted, was not a revision of the earlier "308 Report," but aside from pointing out changes in the number of project units proposed (which would be a detail in any comprehensive plan), the only reason they give for not recognizing it as a revision is that in the earlier

[18] Formed by Memorandum of Agreement on December 12, 1943 signed by representatives of the member federal agencies.

report federal development was not recommended and they say it was recommended in the later report (Pet. Br. 116, 194). Actually, therefore, petitioners would have the Court find that in the 1944 report on the Roanoke River, H. Doc. No. 650, the Army Engineers disregarded the Congressional approval of the original 1926 recommendations as contained in House Document 308 for non-federal participation coordinated with federal construction of comprehensive improvements. Petitioners contend that the Army Engineers in 1944 abandoned the established policy of non-federal participation in river basin improvement (Pet. Br. 112). But this is not borne out by their approval of the Roanoke Rapids license in 1949 (I, 67).[19]

A comprehensive plan of river development comprises a number of sites or units in a river basin capable of orderly construction as the need for each arises over a period of years. Consideration must be and is given by the Commission to the various potential uses of the water resources and to storage possibilities, and provision must be made for development and operation of each project in the plan in order to produce public benefits to the maximum feasible extent, all purposes being considered. The plan of development, of course, may change from time to time

[19] See the testimony of Colonel Gee as the spokesman for the Army Engineers to the same effect (Pet. App. 147, 161).

with changing power requirements, development costs, and general economic conditions (I, 150). Nevertheless, as thus presented by the Army Engineers, comprehensive river improvement plans give as complete a picture as available information permits in order that Congress may decide what, if any, facilities shall be constructed by federal agencies.

One of the primary purposes of comprehensive plans for river improvement is to serve as a guide for development regardless of who does the constructing. The imposition of a license protects every public interest for which Congress has assumed responsibility in water resource development and there is no necessity shown by the Army Engineers for development of all of the projects within most river basins by only a single federal agency, although navigation and flood control facilities are generally constructed by the United States. In a very real sense, therefore, a licensed development is on a par with federal development, inasmuch as a licensee must adhere to the comprehensive plan, must take its license for a fixed term with no specific assurance of renewal and subject to divestiture before the end of the license period under the terms of the Act, must meet strict requirements to protect navigation and national public interests, and must comply with regulations of the Army Engineers for the protection of navigation and flood

control. Thus, within this broad meaning the licensee developer is in practical effect acting for the United States in carrying out the orderly development of national water power resources.

The adaptability of non-federal power plants to comprehensive river basin improvement plans and at federal dams is illustrated by licenses and permits already issued by the Commission with the full approval of the Army Engineers who recommended the general plans.[20] These illustra-

[20] E. g., Cabinet Gorge, Noxon Rapids and Trout Creek projects included in the Army Review Report on Columbia River and Tributaries, 1948, H. Doc. 531, 81st Cong., 2d Sess., Vol. I, p. 342: license issued for Cabinet Gorge, Washington Water Power Co., January 9, 1951, Project No. 2058; preliminary permit for Noxon Rapids, Washington Water Power Co., March 28, 1952, Project No. 2075; preliminary permit for Trout Creek, Montana Power Co., Nov. 15, 1951, Project No. 2076. License issued to County of Placer, California, August 8, 1951, Project No. 2021, for power plant at debris storage dam on North Fork, American River constructed pursuant to authorization in River and Harbor Act of August 30, 1935 (49 Stat. 1028, 1038) as recommended in House Rivers and Harbors Committee Document No. 50, 74th Cong. License issued to St. Anthony Falls Water Power Co., August 31, 1951, Project No. 2056, to use water from United States navigation dam at St. Anthony Falls, Minnesota authorized in the River and Harbor Act of 1937 (50 Stat. 844, 848) as recommended in House Rivers and Harbors Committee Document No. 34, 75th Congress. Two licenses issued in 1934 and 1936 to Kanawha Valley Power Co., Projects Nos. 1175 and 1290, for three power plants at navigation dams on Kanawha River, West Virginia authorized in River and Harbor Act of 1930 (46 Stat. 918, 928) as recommended in H. Doc. No. 196, 70th Cong., 1st Sess. Likewise the benefits of flood control may at times be independently achieved.

tions show that neither the Army Engineers nor the Commission have considered that the Army comprehensive river basin improvement plans (which invariably include a number of projects in the same watershed) constitute a "single package" with development reserved exclusively for federal construction as claimed by petitioners for the Roanoke River (Pet. Br. 173). The Court should give due weight to these administrative interpretations, some of which are of long standing, and are representative of the policies followed. *United States* v. *Shreveport Grain Co.*, 287 U. S. 77, 84.

D. THE SECRETARY OF THE INTERIOR HAS NOT BEEN DESIGNATED BY CONGRESS AS ITS AGENT TO DETERMINE HOW WATER POWER RESOURCES IN THE ROANOKE RIVER BASIN MAY BE BEST UTILIZED IN THE PUBLIC INTEREST

The gravamen of the contentions of petitioners is that the issuance of a license for non-federal construction of the Roanoke Rapids project is an unjust and unreasonable surrender of the fruits of the Government's investment in Buggs Island contrary to the distribution of power benefits among the people of the area, that the issuance

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at multiple-purpose projects without construction of proposed power facilities; as at the Bluestone Dam on the New River in West Virginia the construction of which was started pursuant to Executive Order 7183A, of September 12, 1935 and authorized by Congress in 1936 Flood Control Act (49 Stat. 1570, 1586). No power facilities have been constructed at this dam, although it is in operation for flood control purposes.

of this license vitiates the principle that the entire river basin must be the basic unit of water resources development if the maximum benefits are to be realized, and "that the amount of public power distributed should be large enough to constitute an effective competitive element in the distribution of power in the area" (Pet. Cert. 37–48, 56–57, Pet. Br. 59–60, 80–84, 98, 122–123, 179–184). Neither the statutes upon which petitioners rely nor the facts in this case furnish any foundation for such contentions. They did not submit any comments to the Chief of Engineers on the 1944 Army report on the Roanoke River Basin nor were they requested to do so. Also, they did not appear before any Committee of Congress in 1944 to urge inclusion of the Roanoke River improvements in any legislation.

Even if the desirability of the issuance of the VEPCO license is open to question, as petitioners contend, the decision as to its issuance has been assigned by Congress to the Commission. The Commission's judgment in this highly specialized and technical field, requiring expert analysis of the economic factors which relate to comprehensive development and use of water power for the purposes of such development referred to by Congress in the Federal Power Act and other statutes should not be overturned unless there is no reasonable basis to sustain it or where it is exercised in a manner clearly beyond their statutory au-

thority. *S. E. C.* v. *Central Illinois Sec. Corp.*, 338 U. S. 96, 126–127; *Stark* v. *Wickard*, 321 U. S. 288, 310. The arguments of petitioners themselves show that there is substantial evidence in the record to support the Commission.

In their petitions for certiorari, the petitioners raise only jurisdictional questions (Pet. Cert. 2–3) and therefore they waived any review on questions of fact going to the merits of the Commission's order. *General Talking Pictures Corp.* v. *Western Electric*, 304 U. S. 175, 177. Nevertheless, since their briefs continue to place before the Court facts which they argued before the court below and which were found against them, we deal with some of the factual issues to show that the contentions of petitioners in this regard also are unfounded.

In the first place the functions of the Secretary of the Interior in relation to development of the Roanoke River Basin have been limited by Congress solely to the disposition of power from Army reservoir projects and have not been extended to include either the submission of plans for such development or to the protection of the water resources of that basin against improper development. Section 5 of the Flood Control Act of 1944 provides (58 Stat. 890, 16 U. S. C. § 825s):

> SEC. 5. Electric power and energy generated at reservoir projects under the control of the War Department and in the

opinion of the Secretary of War not required in the operation of such projects shall be delivered to the Secretary of the Interior, who shall transmit and dispose of such power and energy in such manner as to encourage the most wide-spread use thereof at the lowest possible rates to consumers consistent with sound business principles, the rate schedules to become effective upon confirmation and approval by the Federal Power Commission. Rate schedules shall be drawn having regard to the recovery (upon the basis of the application of such rate schedules to the capacity of the electric facilities of the projects) of the cost of producing and transmitting such electric energy, including the amortization of the capital investment allocated to power over a reasonable period of years. Preference in the sale of such power and energy shall be given to public bodies and cooperatives. The Secretary of the Interior is authorized, from funds to be appropriated by the Congress, to construct or acquire, by purchase or other agreement, only such transmission lines and related facilities as may be necessary in order to make the power and energy generated at said projects available in wholesale quantities for sale on fair and reasonable terms and conditions to facilities owned by the Federal Government, public bodies, cooperatives, and privately owned companies. All moneys received from such sales shall be

deposited in the Treasury of the United States as miscellaneous receipts.

This section originated in the Senate, and at that time the limitation of the Secretary's functions was made clear. The Senate Committee reported (S. Rep. No. 1030, 78th Cong., 2d Sess.):

> The committee desires an amendment which provides a convenient and practical method of disposing of power at projects under the control of the War Department without setting up a public power trust which would be unduly competitive with established private power utilities. The committee, therefore, has inserted a proviso [now Section 5 of the Act] which authorizes the Secretary of the Interior to construct and acquire only such transmission lines or related facilities as may be necessary in order to make the power and energy generated at such projects available in wholesale quantities for sale on fair and reasonable terms and conditions to facilities owned by the Federal Government, public bodies, cooperatives and privately owned companies. The committee recognizes the desirability of granting preference in the sale of such power and energy to public bodies and cooperatives when the power is generated at projects financed by the Federal Government. [Matter in brackets supplied.]

In the House of Representatives, equally specific statements were made by Chairman Whit-

tington when the Senate amendment was considered (90 Cong. Rec. 9418–9):

> Mr. JENKINS. May I ask the gentleman this question? Suppose there is a project now that is being built and it can be built without equipment to manufacture power. *Does the gentleman mean that the Secretary of the Interior would have sufficient authority under this bill to compel the building of that project so that he would have power-generating facilities?*
>
> Mr. WHITTINGTON. *He has no authority whatsoever with respect to the construction.* The necessity for this language is this: In some of these reservoirs that are authorized to be constructed there is generation of power. The concrete proposition that confronted our committee was this: Shall we authorize these projects where power is incidental and make no provision for the disposal of it, or shall we leave it to the President of the United States to set up an executive authority as he has done in Arkansas, Texas, and Oklahoma?
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> * * * * *
>
> Mr. JENKINS. Can the Secretary of the Interior under the language and authority of this law build a foundation upon which he and the President can scatter some more T. V. A.'s all over the nation? I should hope it does not.
>
> Mr. WHITTINGTON. *No, he has no power whatever with respect to building and con-*

struction, and his power is limited only to the sale and transmission of the excess power generated at dams authorized and constructed by the War Department. [Emphasis added.]

Power planning objectives of Secretary are not statutory

Petitioners build elaborate arguments as to their asserted interest around what they conceive to be the economic and social necessity for adequate planning for construction of federal power plants far in advance of the demand for power (Pet. Br. 46–53, 84–88).[21] However, the social and economic objectives suggested by petitioners as the purpose of such planning, chiefly, lower power rates through federal power competition

[21] Although petitioners make a number of claims as to the economics of federal development of Roanoke Rapids as related to the other federal power projects in the area and to the electric power rates and power distribution in the area (Pet. 37–39, 56–57, Pet. Br. 53–60, 217–218), they do not claim that the Buggs Island power output alone, as presently authorized by Congress, will not be "an effective competitive element in the distribution of power in that area," or that the evidence shows that the Roanoke Rapids power output is essential for such competition. At the most, all they claim is that the rate competition will be *more effective* with Roanoke Rapids as a federal development than without it. Furthermore, they cite no authority to support their claims as to what constitutes the federal power policy but refer to fragmentary provisions in several statutes (Pet. App. 90), which on analysis fail to support their contentions, and ignore the pertinent provisions of the Federal Power Act which has for over 30 years stated the federal power policy as related to non-federal development of power sites.

and the promotion of non-profit users,—States, municipalities and cooperatives—have not been stated by Congress to be objectives in water resource improvement and development under the Flood Control Acts. Indeed, if effective rate competition had been an objective of Congress in constructing single-purpose power projects such as Roanoke Rapids, it would have been more economical to construct steam-electric generating plants at load centers, thus reducing transmission costs and providing generating capacity more suited to the power requirements of preference customers through whom the competition would be obtained.

On the other hand, Congress has assigned to the Commission and to the Chief of Engineers—not to the Secretary of the Interior—the function of planning for the installation of power facilities at Army reservoir projects, the only class of projects to which Section 5 of the 1944 Act applies. The last proviso of the introductory paragraph of Section 10 reads (Pet. App. 22):

> That penstocks and other similar facilities adapted to possible future use in the development of hydroelectric power shall be installed in any dam authorized in this Act for construction by the War Department when approved by the Secretary of War on the recommendation of the Chief of Engineers and the Federal Power Commission.

Rate competition is not objective of Federal Power Act

Furthermore, it is elementary that the Commission has no quarrel with petitioners over public power as such. Indeed, Section 7 (a) of the Federal Power Act requires the Commission in issuing preliminary permits and licenses to give preference to States and municipalities. But this Section places primary consideration upon the use and development of the water resources themselves, not upon the social and economic factors emphasized by petitioners. For it says that such State and municipal preference shall be given only where their plans are deemed by the Commission to be—

> equally well adapted, or shall within a reasonable time to be fixed by the Commission be made equally well adapted, to conserve and utilize in the public interest the water resources of the region.

The section does not say that preference shall be given where rate competition will result by distribution of power from a proposed municipal plant. Section 7 (a), in pointing the primary consideration to development of water power resources and ignoring the objectives stated by petitioners here, goes on to say that in those cases where applicants other than States and municipalities are in conflict—

> the Commission may give preference to the applicant the plans of which it finds and determines are best adapted to develop

> conserve, and utilize in the public interest the water resources of the region, if it be satisfied as to the ability of the applicant to carry out such plans.

Here, also, *no mention is made of possible rate competition between opposing applicants.*

The basic concept advanced by petitioners—that electric power rate competition from federal plants is of primary importance—finds no support either in the Flood Control Acts upon which petitioners rely, in related legislation, or in debates in Congress.[22] Up to the present time federal electric power development has been considered as purely incidental to the major purpose of water resource development for navigation, flood control, reclamation or irrigation. Even in those statutes now regarded as stating basic federal power policy electric power generation is relegated to a minor or secondary role.

Rate competition not objective in related statutes

When the Tennessee Valley Authority was under attack for purchasing certain transmission facilities, this Court stated the circumstances and said (*Ashwander* v. *T. V. A.*, 297 U. S. 288, 340):

> And the Government rightly conceded at the bar, in substance, that it was without

[22] No constitutional questions appear to us to be raised here, nor does this proceeding concern the authority of Congress adverted to in *United States* v. *Gerlach Co.*, 339 U. S. 725, 738, for the present controversy is concerned with the intent of Congress as expressed in legislation enacted under long-established concepts of Congressional purpose.

> constitutional authority to acquire or dispose of such energy except as it comes into being in the operation of works constructed in the exercise of some power delegated to the United States.

In providing for the expansion of generating and transmission facilities of the Tennessee Valley Authority to meet the atomic-energy program and other defense requirements in the Tennessee Valley area, the Senate Committee on Appropriations in 1950 said (S. Rep. No. 2684, 81st Cong., 2d Sess., p. 7):

> The Committee desires to caution the [Tennessee Valley] Authority, as well as other Government agencies engaged in the development of power from falling water, that the expansion provided should not be used as a precedent for construction of steam generating facilities in order to serve power in peacetime to civilian and industrial needs.

Section 7 of the Bonneville Act (50 Stat. 731, 735, 16 U. S. C. 832f) and Section 6 of the Fort Peck Act (52 Stat. 403, 405, 16 U. S. C. 833f) express the intent of Congress that rate schedules for power sales "shall be determined with due regard to and predicated upon the fact that such electric energy is developed from water power created as an incident to the construction of the dam." Section 1 of each Act said that it was for the purpose of improving navigation "*and other*

purposes incidental thereto." The Boulder Canyon Project (§ 1, 45 Stat. 1057, 43 U. S. C. 617) was authorized as a dam for flood control, navigation, reclamation, and other beneficial uses "and for the generation of electric energy as a means of making the project herein authorized a self-supporting and a financially solvent undertaking."

The United States does not make a profit in power sales

Petitioners disregard the statutory language in referring to benefits which they allege are being taken from the Government or from the public (Pet. Br. 59–60, 98, 122; 179, 181, 187). When a multiple-purpose reservoir is constructed by the Army Engineers, and power is sold therefrom by the Secretary of the Interior, all that Section 5 of the 1944 Flood Control Act (*supra,* 54) requires is that the power rates shall be fixed so as to return to the United States only "the cost of producing and transmitting such electric energy, including amortization of the capital investment allocated to power over a reasonable period of years. * * *" This, of course, applies to the sale of power from Buggs Island and Philpott insofar as the power costs are concerned and these costs are the only costs to be returned to the United States from the investment in those facilities. If the United States should undertake the construction of any other projects in the Roanoke River Basin, the same rule would apply.

All that the United States does, therefore, in selling power from plants it constructs, is to break even—what it spends for power it gets back. It neither makes a profit nor suffers a loss from the power sales. But the power benefits—as do the navigation and flood control benefits—inure to the public, regardless of who builds the plant.[23] To say that the power benefits would not inure to the public under a Federal Power Act license for the Roanoke Rapids project is to say that licenses under the Act are not in the public interest and that the States of Virginia, North Carolina and West Virginia which regulate the power rates of VEPCO, will not discharge their regulatory responsibilities in the best interests of their own citizens. This is a charge which cannot be supported by the record before the Court, although we make no defense of the reasonableness of the rates of VEPCO. Furthermore, petitioners disregard the public loss through continued delay in constructing Roanoke Rapids,[24] particularly in

[23] The only difference in investment and operating costs suggested by petitioners for federal construction as contrasted with private construction is in the lower interest rate on borrowed capital and in the nonpayment of federal, State and local taxes by a federal project. The difference in costs, however, would not provide a basis for finding that the United States would surrender or lose valuable power rights through the issuance of the license here.

[24] "It would be in the public interest, if we had to do it, to refrain from having this project constructed, rather than to have it constructed by the applicant in this proceeding." Witness Seymour, Chief, Division of Power, Department of the Interior (R. 1606).

what is otherwise regarded as a national emergency where every available source of power supply is considered as vital.[25]

Widespread use would not be promoted by Federal construction of Roanoke Rapids

The competitive power argument of petitioners means that the federal power must be sold to public bodies and cooperatives in order to provide the desired competition. No attempt was made by petitioners before the Commission or here to show precisely what municipal power distribution systems or REA cooperatives would be within economic transmission distance of Roanoke Rapids or even Buggs Island (III, 1118–1120),[26] and the power market study by the Southeastern Power Administration (created by the Secretary of the Interior to market federal power in that area) was described by its Administrator as "a quickie", which detracts from its value for any effective purpose (I, 63, 525–559; III, 1119). Nor did petitioners give the transmission costs of such service (I, 63).

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[25] If the power output, already delayed three years, averaged only 345 million kilowatt-hours a year (I, 56), the public has already lost approximately $3,600,000 by the delay (345,000,000 X 3 years X 3.79 mills per KWH, the *energy component of the power cost*, from a steam electric plant (or the cost of coal)) (Exh. 33, R. 3882).

[26] Estimated REA requirements were offered but counsel for the Secretary in offering them twice said "We are not introducing this as evidence of the requirements of the cooperatives" (R. 907, 909).

All of the preference loads in the *VEPCO* service area, whether or not within economic transmission distance of Buggs Island and Roanoke Rapids, amount to less than 6 per cent of the total energy used in that area, the balance being supplied by public utility companies,[27] to whom sales of federal power would not provide any rate competition. If the preference customers in North Carolina and Virginia (which operate at load factors of 42 per cent to 44 per cent) are supplied regardless of transmission costs, they could use only 37,000 kilowatts of the 23 per cent load factor power output of the Buggs Island plant and leave the remaining 53,000 kilowatts of that capacity dependable upon system loads in the area (I, 388–389). If as much as 10 per cent of the Roanoke Rapids power is used directly for preference loads, the remaining capacity of that project would not be dependable upon the area system loads (I, 392). Consequently, for many years in the future the construction of the Roanoke Rapids plant cannot be justified if it is to serve significant loads to preference customers.

It is to be anticipated from past experience that loads of the preference customers will grow, but

[27] Statistics of Electric Utilities, 1949; Statistics of Publicly Owned Electric Utilities, 1949, both by F. P. C.; and 1949 Statistical Report, REA, Dept. of Agriculture. Only 16 percent of the customers in that area are served by preference utilities, municipalities and cooperatives.

they must reach a magnitude of 134,000 kilowatts with one-third of their load supplied by steam generation, before they could even absorb all of the Buggs Island power. Such load conditions are not anticipated within a reasonable period of years (IV, 159). These circumstances being established, it would hardly appear economically desirable to reserve the Roanoke Rapids site to serve preference customers in this area, especially when it is considered that such a small percentage of the consumers in that area would ultimately be benefited under the policies here suggested by petitioners.

Alleged losses to United States are not demonstrated

Petitioners give several figures by way of evaluating what they say will be losses to the United States through the issuance of the Roanoke Rapids license. For one thing, they say that the Government would derive net power benefits in excess of $1,518,000 a year from constructing the Roanoke Rapids project which it would lose if it did not undertake the construction (Pet. Br. 59–60, 98, 122, 179, 181, 187). The assumptions behind these contentions, however, are not sound, for the "net power benefits" will actually accrue to the federal and local governments even if the Roanoke Rapids project is constructed by a private utility.

The annual net power value ($1,518,000) used by petitioners for this purpose was taken from

Exh. 54 as being the difference between the annual cost of alternative equivalent power produced under private financing and the federal cost of producing the power at Roanoke Rapids (Pet. Br. 59, R. 4072). The unit cost of $23.40 per kilowatt used by petitioners for this purpose included $4.39 in taxes.[28] Since the federal and local governments would get the benefit of the taxes if the steam plant was constructed, the net value would be $1,260,000.[29] If VEPCO builds the Roanoke Rapids plant it will pay annually at least $1,017,000 in federal and local taxes on the power output (Exhibit 15, R. 3763) and the net benefit should be further reduced by this amount, leaving a real net value of $243,000 without any taxes. In addition to paying taxes, VEPCO is expected to pay annually in the neighborhood of $250,000 a year as headwater benefits under Section 10 (f) of the Federal Power Act (I, 56), which is more than the net value without taxes. Consequently it is misleading to suggest to the Court that if Roanoke Rapids is federally constructed the United States would derive net power benefits of $1,518,000 a year or $75,000,000 over the fifty-year license period more than if Roanoke

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[28] This is 2.75 percent of the investment per kilowatt, $159.50, in an alternate steam-electric generating plant.

[29] Net value assumed by petitioners, $1,518,000, minus $258,000 (taxes on 58,800 KW at $4.39 per KW) leaves $1,260,000.

Rapids is built by VEPCO (Pet. Br. 121–122). It is no answer for petitioners to say that the taxes on power produced under private financing are paid by the purchasers of such power (Pet. Br. 179). For petitioners use the cost of privately developed power, which includes tax charges, to obtain their net power benefit figure.

Headwater benefits will be paid for as required by Congress

Another element in the losses which petitioners say would be suffered by the United States through the issuance of the Roanoke Rapids license is in the headwater benefits expected to be conferred by the Buggs Island reservoir operation upon the Roanoke Rapids power output. The Commission found that the Roanoke Rapids plant, in addition to its anticipated output from the natural stream flow, may be able to turn out, on the average, approximately 70,000,000 kilowatt-hours a year, valued at about $250,000, solely by reason of the Buggs Island reservoir operation (I, 56). Petitioners say that there will also be some additional *capacity benefits* (I, 23–24), which, with the additional energy output at Roanoke Rapids will have a value of $1,955,000 or possibly $880,800 a year.[30] Accordingly, they

[30] The lower figure was originally reported to the Fourth Circuit as $817,620 and then in an errata sheet raised to $880,800. The petitioners also said that the additional power output would cost $751,000 if generated at a steam plant [overlooking the cost of fuel replacement energy] or $662,000

estimate the equitable part of the annual charges for interest, maintenance and depreciation on the Buggs Island project which the licensee should pay under Section 10 (f) of the Federal Power Act for this additional output to be $690,000 (I, 24).

Whatever the value of the additional power output at Roanoke Rapids by reason of the regulation at Buggs Island, Congress has provided that a licensee shall reimburse the United States under these circumstances only for such part of the annual charges for interest, maintenance and depreciation on the upstream improvement as the Commission may deem equitable (Section 10 (f) of the Act). The Commission said 70,000,000 kilowatt-hours a year of additional energy would cost VEPCO about $250,000 a year if obtained from a steam plant, and therefore the headwater benefits payments under section 10 (f) to reimburse the United States for the Buggs Island investment and operation could not, on the average, equitably exceed that amount (I, 56).

The estimates relied upon by petitioners of the annual value to VEPCO of the additional 70,000,000 kilowatt-hour output which the Roanoke Rapids plant may receive from the Buggs Island

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(I, 23), or between $308,860 and $335,000 (Pet. Brief in C. A., pp. 85–87). The Commission found that the additional power output would cost *VEPCO* about $250,000 a year if generated at a steam-electric plant (I, 56).

reservoir operation rest upon the assumption that the Roanoke Rapids plant output will not be dependable on the VEPCO system load without the Buggs Island storage releases (I, 23–24). The evidence does not support this assumption.

Both the Buggs Island and the Roanoke Rapids plants have a high power installation (with the corresponding high hydraulic capacity) in relation to the average stream flow. During the periods of naturally low river flow the volume of water available is insufficient to operate the turbines continuously so that both plants must be operated for only short intervals during periods of critical flow in order to utilize the generating capacity to its maximum. By operating in the short periods of peak demand during low flow periods, both plants will furnish required capacity and be of their highest economic value and will at the same time utilize the available water supply most efficiently.

In past years the extreme low flow periods at Roanoke Rapids have occurred in the months of September to December, and December is also the month of the annual peak demands on the VEPCO utility system. The Commission found that either with the anticipated power operations of the Buggs Island plant or with the natural stream flow the Roanoke Rapids plant would be dependable on the VEPCO system to its full installed capacity of 91,000 kilowatts, and therefore, the

Buggs Island reservoir operation would not increase that dependable capacity (I, 57–62).

In their assumption of the dependence of Roanoke Rapids upon the Buggs Island storage releases petitioners completely overlook the common practice of utility system operators to operate all generating plants, including steam plants, in the most advantageous place on the load curve. This practice was pointed out by the Southeastern Power Administrator and by the Commission (I, 60, n. 5). Therefore, it is to be expected that during periods of low flow the Roanoke Rapids plant will be operated only for those hours of peak load demand for which it has sufficient water supply, but that when the water supply is adequate to extend the hours of operation, they will be extended in order to utilize the supply and still make the full plant capacity available. The load of VEPCO has the shape and characteristics to make full use of this type of operation.[31] The Commission assumed that VEPCO would follow this common-sense practice and therefore found that the plant will be dependable on the VEPCO system to its full capacity (I, 60–62).

A substantial part of the value attached by petitioners to the additional power output which the Buggs Island reservoir operation will make possible at Roanoke Rapids they say should be credited to the conversion of 24,000,000 KWH of

[31] II, 590–596, 598–614, 892–907, 907–931.

off-peak energy to on-peak energy (Pet. Br. 120). Neither the Commission nor the lower court agreed with this contention and there are good reasons for their disagreement.

As we have just shown, the Roanoke Rapids plant will not be compelled to rely on the Buggs Island reservoir operation for any portion of its dependable capacity. Consequently, it can be operated by VEPCO during those hours when the water supply is available and for most of the time it can replace steam generating capacity which can be shut down to save fuel. Any surplus water over the natural flow that may be released from the Buggs Island reservoir, therefore, will enable VEPCO to shut down part of its steam generating capacity and save fuel. The energy cost from a steam-electric plant was shown to be 3.79 mills per kilowatt-hour (Exhibit 33, R. 3882), so that the value of the 70,000,000 KWH anticipated as additional output at Roanoke Rapids from the Buggs Island reservoir regulation will be worth about $265,000 (70,000,000 x $.00379) and not $700,000 as claimed by petitioners.[32]

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[32] Petitioners also refer to the payment by VEPCO of 9.8 mills per KWH to Braddock Power & Light Co. shown in the record (Pet. Br. 120–121, n. 53). But the Braddock charge obviously included a capacity charge in addition to the energy charge since the fuel cost of steam-generated energy is only 3.79 mills per KWH. And the Buggs Island reservoir operation will not add to the dependable capacity of the Roanoke Rapids plant as already noted.

Roanoke Rapids would have particular value to VEPCO system

In addition to the direct values which the Roanoke Rapids plant would contribute to the utility system of VEPCO by adding 91,000 kilowatts of dependable capacity, and, on the average, about 345,000,000 kilowatt-hours of output a year, this plant would have substantial values which, while not generally evaluated in dollars and cents, nevertheless are of recognizable economic importance to any large utility system. The utility system of VEPCO is now predominantly supplied by steam-electric plants, only some 10,000 kilowatts of dependable capacity out of 704,300 kilowatts of system capacity coming from hydroelectric plants (I, 66). Since the larger steam units in the VEPCO system must necessarily operate at high pressures and temperatures, they are not adaptable to frequent stopping and starting because of the resultant expansion and contraction of their component parts which would mean greater maintenance costs, reduced life of the equipment, and higher fuel costs. Consequently, since there are no practical difficulties in almost instantly increasing or reducing the output of a hydroelectric generating plant to serve varying loads, construction and use of the Roanoke Rapids hydroelectric plant would enable VEPCO to meet widely fluctuating peak loads much more economically than through the use of steam electric plants.

The Roanoke Rapids plant will also improve the reliability of power supply in the area by providing generating capacity locally, make the area less subject to interruptions or disturbances caused by transmission line outages, and improve to some extent the voltage regulation on the system in that area.[33] None of these utility system values could be utilized by the United States and therefore have been ignored by petitioners. But all taken together they materially contribute to full and comprehensive development of the water resources available at Roanoke Rapids if that site is developed to serve a large utility system such as that operated by VEPCO.

Commission licenses are consistent with comprehensive development

The concept of comprehensive river basin development has not lain dormant awaiting the sponsorship of petitioners to bring it to fruition, but this concept is a keystone of the Federal Power Act, and has been a continuing basis for licensing since passage of the Act in 1920. As the Court said in *First Iowa Coop.* v. *F. P. C.*, 328 U. S. at pp. 180–181:

> It [the Power Act] was the outgrowth of a widely supported effort of the con-

[33] I, 66, 291–296, 297–299, 329–340, 341–347, 349–350, 367–407, 412–486; II, 589–590, 590–596, 598–614, 892–907, 907–931, 933–972, 972–979; R. 140–141, 576–577, 2204–2205.

> servationists to secure enactment of a complete scheme of national regulation which would promote the comprehensive development of the water resources of the Nation, in so far as it was within the reach of the federal power to do so, instead of the piecemeal, restrictive, negative approach of the River and Harbor Acts and other federal laws previously enacted.

The Court then noted those sections of the Act which relate to broad considerations of water resources improvement and development, provisions which could as well be noted in the present situation. Section 27 of the Act, referred to by the Court in another connection, is also appropriate here, for it is a clear requirement that the Commission must give due consideration to water rights under State law for irrigation and municipal water supply and similar uses, and, like Section 10 (a), shows that the Commission cannot confine its attention to isolated power developments but must consider all of the possible uses of water resources "within the region" before it may authorize the development of a particular project.

Under the Act the Commission must give consideration to the water power industry and its relation to other industries and to commerce and to the public in its demand for power; to the location, capacity, development costs and relation of power sites to markets; to the possi-

bility of utilizing Government dams for water power; to the determination of the situations under which water power resources should be reserved for federal development; what type (run-of-river, water storage, peak-load, or base-load) water power construction would be best adapted to comprehensive development of the water resources of a region in relation to the needs of commerce, navigation, irrigation, municipal water supply, recreation and other uses, and similar questions before it decides that water power development by States, municipalities, cooperatives and privately owned power companies should be licensed.

Factors determining comprehensive development

It will be noted, however, that all of the project functions in connection with the licensing of hydroelectric projects look to improvement and preservation of a physical plan of watershed development and licenses may only be issued when the integrity of that physical plan will be enhanced or at least preserved and when in any event the development of the water resources will be in the public interest.

The general economy of a region, the power loads, the relationship of the water power industry to other industries, the potential use of the power output from a proposed hydroelectric project, and related factors necessarily affect the

development of water power resources available at a particular site. Some sites, by reason of the topography of the area, are susceptible of development by large storage reservoirs, as at Buggs Island, which may be used for flood control storage and for power storage. A flood control reservoir would be of its maximum value for its major purpose if it was empty when a flood came. Consequently, flood control reservoirs generally are drawn down as soon as possible after each flood and are not filled until the next flood comes. Power storage reservoirs, on the other hand, are of principal value for power development when they are filled. Therefore, the same storage space usually cannot be used at the same time for both purposes.

One factor to be considered in determining the type of power installation best suited to utilize the available flow is whether there is a sufficient flow of water to provide for a continuous power output or the power output would be limited to intervals of varying duration as required to meet the load. If the generating capacity in operation in any water power plant is reduced, the hours of operation during critical water conditions can be extended with the same volume of water, but the capacity value of the plant is correspondingly reduced. The Buggs Island power plant was proposed for operation on a load factor of from 21 to 23 per cent during the critical period, with an

initial installation of 108,000 kilowatts (Exh. 1, pp. 11, 15; R. 1139, 1141, 2456). Since the same volume of water will be available during the critical low water flow period, regardless of the generating capacity installed, the hours of use must be reduced to justify the ultimate installation of 204,000 kilowatts, the installation which has been authorized and is being completed. (I, 64). Consequently, at that plant the load factor during the critical period will actually be around 15 per cent (Exh. 10; R. 3655, I, 64). While the physical structures which the Secretary of the Interior would construct at Roanoke Rapids would be the same as proposed by VEPCO, the method of operation in each case would, of course, depend upon the loads served. The Commission has found, and the evidence amply supports its finding, that the United States could not utilize the Roanoke Rapids site as effectively and completely as can VEPCO.

Electric power demands fluctuate from day to day, from week to week, and from season to season, and generating capacity must be available to meet the widely fluctuating demands of the customers served. In modern utility service, therefore, the capacity value of a particular hydroelectric plant may be of as much or more significance than its annual energy output which, in the last analysis, is dependent entirely upon the volume of available water which it can use. When there is a proper balance between capacity instal-

lation and energy output in a particular water power plant, and there are customers available to absorb the power output at the proper time, all of the available water can be utilized to its fullest advantage in the public interest. These considerations, which must be and are weighed by the Commission in issuing licenses under the Federal Power Act, go to the physical plan of water resource development, since the objective manifestly is to achieve the fullest possible utilization and development of water power resources as promptly as economic conditions justify and with proper adjustment in the public interest of otherwise conflicting water uses. These considerations were found by the Commission to be applicable to the situation at Roanoke Rapids (I, 48–77) and its findings were sustained by the lower court (V, 42–46).

Licensing activities of Commission

Although professing no reflection on the accomplishments of the Commission, petitioners advise the Court that during the past 30 years the Commission has licensed projects at the average rate of 2½ a year and has licensed new projects at the average rate of 1 a year. At this rate, they say, the Commission would take 1,500 years to license the remaining sites (Pet. Br. 168–169, Pet. App. 80–89). The number of licenses issued, however, is no indication of the number of projects covered by the licenses. For example, petitioners say that

8 *projects* were licensed in fiscal 1951, whereas actually 8 *licenses* were issued during that fiscal year covering 19 developments with a total installed capacity of 1,220,000 KW, of which all but 18,640 KW was for new capacity. Petitioners also fail to mention license amendments which are as important as new licenses when they authorize new construction. During fiscal year 1952 the Commission issued 17 licenses and amendments covering 26 plants having 366,160 KW of existing capacity and 1,276,100 KW of new capacity.

Petitioners say that 110 "major project sites" had been licensed by the Commission by the end of fiscal year 1951 (Pet. Br. 168). Actually, as of that date, 192 major licenses were outstanding covering 246 plants with an ultimate installed capacity of 7,399,297 KW. Of the 192 licenses, 77 were for 89 plants each having an ultimate installed capacity of less than 2,500 KW. The remaining 115 licenses covered 157 plants which have provision for a total ultimate installation of 7,333,547 KW. The present installed capacity of the plants under license as of June 30, 1951 was about 29 per cent of the total installed hydroelectric capacity in the United States, both federal and non-federal. Petitioners do not say what undeveloped power sites and what unauthorized constructed projects are subject to licensing.

The suggestion that it would take the Commission 1,500 years at its present rate of activity

to license the undeveloped power sites (Pet. Br. 169) is also unfounded. A large portion of the undeveloped water power in the United States lies in the Pacific Coast and TVA areas. In those areas hydroelectric generating capacity furnishes the bulk of the power supply. In the other regions fuel generating capacity predominates and hydroelectric capacity has its greatest value for peaking purposes, as at Roanoke Rapids and Buggs Island.

In these other regions the rate of new development is governed by inexorable laws of economics, chiefly the factors governing the time at which peaking capacity is required by load growth and as influenced by the fact that higher fuel costs and lower money costs favor hydroelectric installations over fuel development. In the TVA region, where the capacity has been predominantly hydroelectric but included about 440,000 KW of fuel capacity, it has been found necessary recently to install substantial new fuel capacity. In the West Coast regions there are potential sites having about 58 per cent of the national undeveloped hydroelectric capacity, although in those regions the power demands were less than 17 per cent of the 1950 total peak demands in the United States. Another 12 per cent of the total undeveloped hydroelectric capacity is in the Southeast (which includes the TVA area), but this region supplied only about 15 per cent of the 1950 total national

peak demand. These areas, therefore, have about 70 per cent of the total undeveloped hydroelectric capacity and only about 27 per cent of the total peak load throughout the United States. Consequently, it is not practical economy to develop hydroelectric capacity too rapidly in these areas.

Finally in this connection, it is obvious that even if the Commission had issued only one license during the past thirty years, nevertheless the Federal Power Act is the statute by which Congress has directed that non-federal participation in water resources development may be authorized and controlled. If petitioners desire a change in the procedures adopted by Congress to this end, their appeal is to that legislative body, not to the courts.

It is evident from the foregoing that the authority of the Commision to issue the license to VEPCO for the Roanoke Rapids site has not been withdrawn by Congress by the Flood Control Act or any other statute and that the record shows conclusively that the public interest will be best served by utilization of the water resources at the Roanoke Rapids site under the provisions and safeguards of the license issued to VEPCO.

II. THE COMMISSION IS NOT PRECLUDED BY SECTION 7 (B) OF THE FEDERAL POWER ACT FROM ISSUING A LICENSE FOR THE ROANOKE RAPIDS PROJECT

As a second alleged independent bar to the issuance of a license for the Roanoke Rapids development, petitioners claim that the Commission

is precluded by the provisions of Section 7 (b) of the Federal Power Act from issuing the license because on May 3, 1944 it wrote a letter to the Chief of Engineers which they say expressed its judgment that the development of the water resources of the entire Roanoke River Basin should be undertaken by the United States (Pet. Br. 206–245). The Commission and the lower court properly rejected this argument (V, 40–42). In its letter to the Chief of Engineers the Commission said (I, 142):

> Based upon the consideration given hereinbefore, and upon careful review of the reports of your Department, the Commission concurs in the conclusion of the Board of Engineers for Rivers and Harbors that the comprehensive development of the Roanoke River Basin, in general accordance with the plans prepared therefor by the district engineer consisting of 11 dams and reservoir projects with power, is desirable and that the Buggs Island and Philpott projects would constitute a desirable initial step in the development of the Roanoke River Basin.

This letter differs from a report to Congress under Section 7 (b) of the Federal Power Act. That section provides:

> Whenever, in the judgment of the Commission, the development of any water resources for public purposes should be undertaken by the United States itself, the

> Commission shall not approve any application for any project affecting such development, but shall cause to be made such examinations, surveys, reports, plans, and estimates of the cost of the proposed development as it may find necessary, and shall submit its findings to Congress with such recommendations as it may find appropriate concerning such development.

Thus, it will be noted that the recommendations of the Commission under Section 7 (b) are to be made to Congress, not to the Chief of Engineers, and for a specific purpose, namely, to propose federal development. The agency making recommendations to Congress, in this instance the Secretary of War, obviously has the major responsibility, since that responsibility is assigned to the Army by Congress in the river and harbor and flood control acts. In a Section 7 (b) recommendation to Congress, the Commission has the responsibility for making necessary examinations, surveys and plans in support of its recommendations and the purpose is expressly stated as relating to development which should be made by the United States. A comprehensive river basin survey, on the other hand, is prepared by the Army Engineers in accordance with the policies first outlined in 1926 in House Document No. 308 to coordinate federal and non-federal water resources development to achieve maximum utilization (*supra*, 43). The Commission's advisory

comments submitted in its letter of May 3, 1944 to the Chief of Engineers on the survey report on the Roanoke River Basin likewise followed the policies which had been first outlined in 1926 in House Doc. No. 308. Question as to the desirability of non-federal development of a particular project site, as opposed to development by the United States of those water resources, would not normally arise under Section 7 (b) until an application for a license is filed and the Commission has before it a concrete proposal by an applicant to consider and weigh as against the desirability or possibility of federal development and an occasion to study the merits of each alternative in terms of the comprehensive development.

The only statutory responsibility of the Commission in connection with stream improvements recommended by the Army Engineers relates to the installation of penstocks in those multiple-purpose dams which could be constructed by the United States for flood control as well as power development and other purposes. In Section 4 of the 1938 Flood Control Act (52 Stat. 1215, 1216), Congress for the first time provided that penstocks and similar facilities adapted to possible future use in the development of hydroelectric power should be installed in the dams therein authorized when approved by the Secretary of War upon the recommendation of the Chief of

Engineers and the Federal Power Commission. This provision has been incorporated in all subsequent flood control legislation and appears in Section 10 of the 1944 Act (*supra,* 13). Prior to 1938 the Chief of Engineers had been submitting proposed "308 Reports" to the Commission for comment and he continued to do so after the penstock provision was enacted. The Commission, however, did not confine its comments after 1938 on proposed Army survey reports solely to those multiple-purpose dams where penstocks could be advantageously installed but continued as before to comment on the power possibilities of all of the developments included within a proposed general plan, including single-purpose power projects, as shown by its letter on the Roanoke River plan of development (I, 138). Obviously, however, such comments on a voluntary cooperative basis do not take the place of a Commission report and recommendation to Congress under Section 7 (b) of the Federal Power Act.

As evidence of the responsibilities of the Secretary of the Interior for power development at federal projects, petitioners refer to a provision in the Act of March 1, 1917 (39 Stat. 950, 33 U. S. C. 701) that in reporting to Congress on preliminary examinations the Chief of Engineers shall submit with his report "the separate report of the representative of any other department" (Pet. Br. 80). The Act of 1917, however, is not

referred to as authority for submission of the 1944 Army Engineers' report on the Roanoke River Basin (Exh. R, R. 3533, 3552), nor was the Secretary of the Interior asked to submit his comments thereon and he did not do so. (See *infra*, 120).

The statement of the Commission in its licensing order of January 26, 1951 (I, 68), that it had not in its 1944 comments to the Chief of Engineers submitted recommendations for federal construction of Roanoke Rapids pursuant to Section 7 (b) of the Federal Power Act, rested not alone on the then recollection of the Commission but on the very substantial difference between its customary examination and study of the Army general survey reports and an examination under Section 7 (b) to determine whether a particular development or particular water resources should be reserved exclusively for federal construction.

Not the least of the considerations entering into a decision to reserve certain water power resources for federal development is the economic time limit for federal development. The Commission pointed out in 1951 that it had not even then been shown that the Federal Government would ever develop the Roanoke Rapids site and that a denial of a license to VEPCO would mean continued waste of water power resources available at that site (I, 68). The continued wastage of such resources is contrary to the philosophy

of the Federal Power Act to provide for prompt development of water power resources.[34] This possibility of wastage was evident to the Commission when it wrote to the Chief of Engineers in 1944,

From this it should not be assumed that when federal development is considered desirable the Commission does not, in reporting upon general river development plans, recommend federal construction at particular sites: On the contrary, it has done so in many instances.[35]

Although the Section 4 (e) proviso imposes a time limit upon the Commission of two years after it makes a recommendation to Congress for federal power development at a Government dam before a license for non-federal development

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[34] H. Rep. No. 61 and S. Rep. No. 180, both of the 66th Cong., 1st Sess., and H. Rep. No. 842 of the 63d Cong., 2d Sess.

[35] Among other developments, the Commission, in writing to the Chief of Engineers, recommended Federal construction of the Allatoona project on the Etowah River (January 19, 1940); the Cheatham project on the Cumberland River (June 21, 1949); the Table Rock and Bull Shoals projects in the White River Basin (May 29, 1940); the Terminus and Success projects in the San Joaquin Valley (June 13, 1941); the Chief Joseph (formerly Foster Creek) project in the Columbia River Basin (March 18, 1946); and the Narrows project on the Little Missouri River (April 23, 1940). In December 1950 the Commission denied the application of the Power Authority of the State of New York for a license for a power development in the St. Lawrence River, Project No. 2000, and referred the matter to Congress (87 PUR NS 65). A month later, it issued the license here under review.

may be issued, Section 7 (b) imposes no such limit. Petitioners contend that this proviso in Section 4 (e) has no application here because it deals with what are known as Government "navigation" dams (Pet. Br. 238). But the definition of a Government dam in Section 3 (10) means "a dam or other work constructed or owned by the United States for Government purposes with or without contribution from others." This, of course, would include a flood control, power, or multiple-purpose dam as well as a navigation dam.

The application of VEPCO for the Roanoke Rapids license was not filed until four years after the Commission's letter of May 3, 1944 to the Chief of Engineers and the Commission's order issuing the license was not adopted until 1951. Section 7 (b) expressly states, in this connection, that it is to apply *"whenever" it is the judgment of the Commission,* which plainly means that when it is not the judgment of the Commission that federal development should be undertaken, it is under no statutory obligation pursuant to Section 7 (b) to refuse a license. The Commission expressed its considered judgment in 1951 that federal development of Roanoke Rapids was not desirable and therefore that site was open to licensing. If, under the proviso of Section 4 (e), there is only a two-year limitation upon the issuance of a license after a Commission recommendation to Congress for federal development at

a Government dam, it would be unreasonable to hold that where the Government has no dam and Congress has made no decision to build one, the Commission, upon a Section 7 (b) recommendation, is precluded for a longer period from granting a federal license.

It is conceded by petitioners (Pet. R. Br. in No. 28, p. 6) that a Section 7 (b) determination may be later re-examined under some circumstances. But they deny the right of re-examination here because, they say, Congress acted upon the Commission's 1944 recommendation and thereby reserved all of the Roanoke River sites for federal construction (Pet. Br. 237–239). Whether or not Congress acted upon the Commission's alleged 1944 recommendation for federal development of Roanoke Rapids is to be determined by scrutiny of Section 10 of the 1944 Flood Control Act, not from an examination of Section 7 (b) of the Federal Power Act.

As to whether the Commission recommended federal construction of the Roanoke Rapids project, the Commission's letter speaks for itself. The Commission merely concurred in the report of the Army Engineers. In order to find that the Commission by this concurrence recommended federal construction, the Court would have to find that such was understood by the Commission to be the recommendation of the

Army Engineers. However, as we have shown (*supra*, 43–52) the Army Engineers in the Roanoke River report (H. Doc. No. 650, I, 135–178b) presented a general plan of river improvement and development by means of which the water resources of the Roanoke River Basin could be best utilized in the public interest. They did not thereby recommend that Congress preclude non-federal construction of the eight power projects envisaged (*supra*, 40).

Petitioners, moreover, overlooked the further statement of the Commission to the Chief of Engineers (I, 142) that—

> The Commission believes that the power which could be produced at the Buggs Island and Philpott projects could be absorbed and profitably utilized in the postwar period within a reasonably short time following their construction and that plans, therefore, for these two projects should be prepared with the view to their construction in the early postwar period.

This is to say that the power output of the proposed Buggs Island and Philpott projects could be absorbed in the power market of that area and this, of course, must necessarily include sales to preference customers, power companies, and industrial concerns. Construction of the Buggs Island and Philpott projects was considered desirable by the Commission because they were the two principal flood control reservoirs

recommended by the Army Engineers for this river basin and neither project would be economically feasible without power development in addition to flood control. The Commission did not express a similar conclusion with respect to Roanoke Rapids.

Flood Control Act of 1944 did not amend Section 4 of Federal Power Act

As another argument pointing to the inapplicability of the proviso of Section 4 (e) to the situation here, petitioners say that this proviso must be reconciled with the requirement of Section 5 of the Flood Control Act of 1944 that "power and energy generated at reservoir projects under the control of the Department of the Army * * * shall be delivered to the Secretary of the Interior," which precludes non-federal development of power at any reservoir project under the control of the Department of the Army (Pet. Br. 238). The short answer to this obviously is that since there is no federal dam of any kind at Roanoke Rapids, there is no power generated there by the United States. If a dam is ultimately constructed by VEPCO under the license issued by the Commission, it will not be a Government dam nor a dam to which Section 5 of the 1944 Flood Control Act applies.

Even at a Government navigation dam operated by the Secretary of the Army, however, the quoted provisions of Section 5 of the 1944 Act

calling for sale of power by the Secretary of the Interior would not be applicable if the power plant were constructed by a licensee; as, for example, at the London, Marmet and Winfield navigation dams on the Kanawha River in West Virginia where the power plants were constructed and are operated by the Kanawha Valley Power Company under Federal Power Act licenses (Projects Nos. 1175 and 1290), the Lower St. Anthony Falls navigation dam on the Mississippi River where the power plant was constructed and is operated by Northern States Power Company (Project No. 2114) and similar situations (*supra*, 51). The requirement in Section 5 of the 1944 Act for distribution of power by the Secretary of the Interior manifestly can only be applicable to power generated at federal power plants (*supra*, 54).

Under proper analysis, therefore, it is apparent (1) that neither the Army Engineers nor the Commission in 1944 recommended federal construction of Roanoke Rapids; (2) that even if the Commission did so recommend in its letter of May 3, 1944 to the Chief of Engineers it was not barred by Section 7 (b) of the Federal Power Act from issuing the contested license to VEPCO in 1951; and (3) that nothing in the Flood Control Act of 1944 amended the Federal Power Act insofar as that Act relates to the licensing of the Roanoke Rapids development.

III. PETITIONERS DO NOT HAVE THE STANDING NECESSARY TO OBTAIN COURT REVIEW OF THE COMMISSION'S ORDER

In the foregoing sections of this brief we have undertaken to show that the court below was right, on the merits, before taking up the jurisdictional question, to which we now turn, of petitioners' standing to obtain court review of the Commission's order. We are following this reversal of the usual sequence for two reasons. First, it permits us, while establishing the Commission's licensing power, to show the limited scope of the Secretary's statutory powers, before pointing out the particular consequence of those limitations, namely, that he lacks standing to obtain judicial review because his statutory powers do not make him the representative of interests of the United States which are adversely affected by the Commission's order. Second, the question of petitioners' standing to obtain review is not so important to the Commission as the interpretation of the laws which it must administer.

The Power Act's "distinctive formulation of the conditions under which resort to the courts may be made," by which Congress has determined "the scope of the jurisdiction of the lower federal courts" to review orders of the Commission,[36] is set forth in Section 313 (b):

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[36] *F. P. C.* v. *Pacific P. & L. Co.*, 307 U. S. 156, 159.

> Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the Circuit Court of Appeals of the United States. * * * The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive *. * *. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in Sections 239 and 240 of the Judicial Code, as amended * * *.

Any consideration of the standing of petitioner, United States, on the relation of Oscar L. Chapman, Secretary of the Interior, to obtain the review which was sought in the Court below, in a proceeding in which the Federal Power Commission is respondent, must begin with the recognition that the existence of a justiciable "case or controversy" depends upon the existence of separate and distinct interests of the United States represented by the respective branches of the Government. *United States* v. *I. C. C., United States, et al.*, 337 U. S. 426. There this Court, holding that the United States as shipper could challenge an I. C. C. order (337 U. S. at p. 426), recognized that the United States was there suing in its limited capacity "as shipper" (337 U. S.

at p. 431) and defending in the separate and distinct capacity in which it is represented by the Interstate Commerce Commission (337 U. S. at p. 432). This Court was there able to find that the constitutional requisites of "case or controversy" were satisfied, only by treating as separate and distinct the capacities in which the United States sued and in which it defended, saying (337 U. S. at p. 430), "courts must look behind names that symbolize the parties to determine whether a justiciable case or controversy is presented."

The question of the standing of the United States here to obtain review of the Federal Power Commission's order under Section 313 (b) is a novel one because petitioners claim that the Secretary represents the same interests of the United States which the Commission has undertaken to represent, namely, those relating to the conservation and utilization of water power sites like Roanoke Rapids. The courts are asked to resolve, not a "case or controversy" but an argument which the petitioner, United States, is having with the respondent, United States, where no distinction can be drawn between the interests of the United States which are represented by the respective branches of the Government. Furthermore, petitioners' brief claims that the Secretary has standing to obtain court reversal of the Commission's order not only on the ground of

want of Commission jurisdiction to issue the license but, alternatively, on the ground of alleged error in the Commission's exercise of its discretion, if it has jurisdiction. Thus the brief argues that, assuming "the granting of the license were within the Commission's discretion, and it exercised its discretion in such a manner as to * * * prejudice the ability of the Secretary to carry out the laws of the United States for the execution of which he is responsible," the Secretary could act upon behalf of all interests of the United States to prevent such Commission action (Pet. Br. 40); and that for the resolution of such a "*case or controversy* the proper method is by such judicial review as is provided by law" (Pet. Br. 41; the emphasis was petitioners').

Upholding the standing of the United States here would also require the courts to overcome their usual reluctance to substitute their discretion for that of an administrative agency, and to disregard the other restraints which courts have heretofore observed in passing on questions within the primary jurisdiction of an administrative agency. For petitioners are requesting more than such relief as a private petitioner for court review might seek. They are asking the courts not merely to determine the legality of an administrative exercise of jurisdiction, but to choose between two views of how administrative jurisdiction should be exercised where both views are

based on the same factual record. This would require the courts to step beyond the usual bounds of judicial review and, in effect, to substitute their decision for the administrative decision. But such "a determination would be administrative or legislative rather than judicial in character," hence beyond the power of the courts. *American Broadcasting Co.* v. *F. C. C.*, 191 F. 2d 492, 502, note 12 (C. A. D. C.); see also *F. C. C.* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 141, 144. Furthermore, when Congress has intended to give one agency a voice in the field of another it has been careful to say so explicitly.[37]

Before the bounds of judicial review are so enlarged, the justification for such a step should be clear, its necessity inescapable.

The search for such justification is not helped by petitioners' arguments that the admission of parties as intervenors in the proceeding before the Commission was a determination that they have such interests as would make them parties aggrieved by a Commission decision adverse to

[37] *Cf.*, *e. g.*, F. P. C. approval of rates for government-produced power, Flood Control Act of 1944, § 5, 58 Stat. 887, 890; Commission-prescribed system of accounts to be followed by government agencies generating and selling power, Federal Power Act, Section 303; departmental recommendations to be made regarding license conditions relating to navigation and protection of reservations, Federal Power Act, Section 4 (e).

their contentions. Those arguments ignore the complete difference between the statutory requirements for intervention before the Commission and those for judicial review. The Power Act expressly provides that intervention may be permitted solely because of the possibility that "participation in the proceeding *may be* in the public interest" (Section 308 (a), emphasis supplied). Significantly the Act uses the words "may be," not "will be," making it necessary to find only the possibility of an interest, not that there is an interest, in order to warrant admission as an intervenor. But to be a "party aggrieved" entitled to review the party himself must have an actual substantial interest, directly affected adversely. See cases cited *infra*, p. 131.

In *The Chicago Junction Case*, 264 U. S. 258, upon which petitioners rely (Pet. Br. 21–22), there was no such difference between the requirements for "full intervention," which the parties there seeking court review had been accorded by the I. C. C., and the requirements for standing to sue for court review. As the Court's opinion there pointed out, the I. C. C. could grant leave to intervene "only to one showing interest" (264 U. S. 258, at p. 268).

But where there has been a difference between standing to intervene and standing to obtain review, or even a possibility of such difference, a different result has been reached. *Boston Tow*

Boat Co. v. *United States*, 321 U. S. 632. There appellant had been admitted as an intervenor before the I. C. C., although its only interest in the proceeding was that the outcome might be a precedent for decision in another proceeding before the I. C. C. in which it had a direct interest. Notwithstanding the fact that appellant had been admitted as intervenor before the I. C. C., this Court held that appellant did not have an appealable interest in the matter decided by the I. C. C. regardless of the correctness of that intervention (321 U. S. at pp. 633–634):

> We are of opinion that [appellant's] interest * * * is insufficient to entitle it to a separate appeal * * *. Whether [appellant] had sufficient interest to intervene as of right before the Commission and the District Court we need not decide * * *.

The fact that the question of "aggrievement" has been raised in so many court cases concerning persons who had been admitted as intervenors in the administrative proceeding, and has been decided irrespective of their admission as intervenors, confirms the lack of foundation for petitioners' claim.[38]

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[38] *F. C. C.* v. *Sanders Bros. Radio Station*, 309 U. S. 470; *American P. & L. Co.* v. *S. E. C.*, 325 U. S. 385; *Associated Industries* v. *Ickes*, 134 F. 2d 694 (C. A. 2); *U. S. Cane Sugar Refiners' Assn.* v. *McNutt*, 138 F. 2d 116 (C. A. 2); *Gilbert* v. *S. E. C.*, 146 F. 2d 513 (C. A. 7); *National Coal Assn.* v. *F. P. C.*, 191 F. 2d 462 (C. A. D. C.).

The Commission's express reservation in the intervention orders here,[39] that admission as an intervenor should not be construed as recognition that the intervenor might be aggrieved by the issuance of an order adverse to his contentions, was therefore not strictly necessary. But certainly the reservation cannot be disregarded and an opposite conclusion reached, as petitioners assume, merely because the Commission frequently employs such a reservation (Pet. Br. 20–26; *cf.* Pet. Br. 68). And the fact that the Commission has a rule to the same effect (18 C. F. R. 1.1 (f) (13)) cannot indicate that the rule and the reservation do not particularly apply to these intervenors, as petitioners' brief asserts without any attempted substantiation (Pet. Br. 22). Rather, both the practice and the rule show that the Commission was here following its usual policy of liberal admission of intervenors to secure as much help as possible in reaching its decisions. Here, as in the usual case, it took pains to make sure that its action should not be construed as an im-

[39] The Commission's order admitting the Secretary as intervenor in the proceeding before the Commission contained the following reservation (I, 71): "*And provided further*, That the admission of such intervener shall not be construed as recognition that he might be aggrieved because of any order or orders entered in this proceeding."

There was a similarly worded reservation in the order admitting the other petitioners here as intervenors in the Commission proceeding (V, 22).

plied finding of the existence of a sufficient interest to support standing to obtain court review if intervenors' contentions should be denied.

The same erroneous equating of the requisites to intervention with those of judicial review underlies petitioners' contention (Pet. Br. 23) that the Commission's express finding, that the REA Association had not shown that it would be aggrieved by issuance of the license to VEPCO, was of no significance because the Commission had not by order vacated its earlier order permitting intervention. Moreover the Commission's position on petitioners' interests is clearly shown by its final finding as to the REA Association, and its equally clear final finding that the Secretary did not have the interest necessary to make him a party aggrieved by the issuance of the license (I, 46). That position would not be affected by the inferences petitioners seek to draw from the intervention orders and other interlocutory procedural steps, even if the inferences were warranted (Pet. Br. 18–26).[40]

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[40] Another such procedural step which will not bear the inference petitioners would place upon it was the Commission's notice to the Secretary of the filing of the application for license and request for his views and advice on measures which should be taken to protect fish and wildlife and its invitation "to report otherwise on the application to the extent that you may deem desirable" (Pet. Br. 18, note 10). As the brief for the Secretary admits, this notice was merely in accordance with established practice. It afforded the Secretary an opportunity to decide what, if any, action he should

Nor is justification for this new extension of the scope of judicial review found in petitioners' argument that in determining standing, the legality of petitioners' claim of interest must be assumed because (Pet. Br. 70):

> Just as in determining whether a plaintiff has standing in court, one must assume that the facts stated in the complaint are correct, so, also, in determining whether a petitioner has standing in court to question the validity of an administrative order, it must be assumed that the order is invalid "for the precise reasons set forth in the petition."

Petitioners cite *Associated Industries* v. *Ickes*, 134 F. 2d 694, 699 (C. A. 2), in support of this proposition. But Judge Frank's opinion in that case was clear that, assuming the order to be invalid and reviewable, petitioner still has the burden of showing that he is "the kind of person entitled

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take with respect to license provisions prescribing fishways (Federal Power Act, Section 18), license conditions for protection of any reserved public lands which examination might show were within the project boundaries (Section 4 (e)), or the approval of license fees where Indian reservations are involved (Section 10 (e)). Such notification of each application filed is recognition of no more than that the Secretary *may* have some such function with respect to some of those filings—certainly not an adjudication that he *does* have any such interests (let alone interests of the kind now claimed) in every filing. The fact that the claim now asserted had never been made by the Secretary prior to the notification here given is sufficient in itself to dispose of the claimed inference.

to seek court review" (134 F. 2d at p. 699).

Even if it be assumed, *arguendo*, that the Commission's order is invalid under the provisions of the Federal Power Act and Section 10 of the Flood Control Act of 1944 precisely as petitioners contend (Pet. Br. 71), that is not enough to establish that the Secretary has standing to obtain court review. For the Secretary's standing is dependent on aggrievement of interests claimed to be derived from other statutory provisions, *i. e.*, Section 5 of the Flood Control Act of 1944, Section 3 of the Flood Control Act of 1917, and certain other miscellaneous sources (*infra*, pp. 120–121). Petitioners' contentions as to the meaning of those provisions does not have to be assumed to be correct. While a motion in the nature of a demurrer (to which petitioners' brief seeks to analogize our attack on their standing to sue) assumes the correctness of the *facts* well pleaded in the pleading demurred to, it does so for the very purpose of testing the legal sufficiency of that pleading. The correctness of the legal premises of the petitioner's interests upon which he bases his claim of standing to obtain review—the question of their legal sufficiency—like that of a complaint, is a matter on which the petitioner always bears the burden.

Putting aside therefore the casuistries with which the petitioners' brief would foreclose the central question we take up the claimed grounds

of the respective petitioners' standing to obtain court review.

A. THE SECRETARY DOES NOT REPRESENT ANY UNITED STATES INTEREST ADVERSELY AFFECTED BY THE ORDER

Petitioners' brief takes the position that the Secretary intervened in the Commission proceeding in his representative capacity (Pet. Br. 37). In doing so he could of course represent only such interests of the United States as the laws of the United States authorize. Therefore, while the United States was allegedly the real party in interest, its participation was at most in a limited capacity—limited to those interests, and only those, committed to the Secretary by law.

So also the Secretary could get into court upon behalf of the United States, at most, only as representative of the same interests. The caption which the Secretary has adopted for his pleadings in the court below and in this Court should not obscure this important limitation. The "United States" which is the real party in interest represented by the Secretary is only that segment of the total interests of the United States which has been committed to the administration of the Secretary. This petitioners concede (Pet. Br. 39–40):

> * * * before a public officer may attack an administrative order before the courts, he must be able to point to an interest, for

which he is charged with responsibility, that may be adversely affected by the order.

An examination of petitioners' claims will make plain that there is no such interest which was adversely affected so as to constitute the "United States" (statutory capacity of the Secretary) a "party aggrieved."

1. *The Secretary is not authorized to represent any United States interest in possible governmental development of Roanoke Rapids*

Petitioners' initial reliance is upon the "duty and responsibility of transmitting and disposing of power from Army projects," vested in the Secretary by Section 5 of the Flood Control Act of 1944. However, without citing any other statutory authority pertinent to the Roanoke Rapids development, petitioners usually couple their reliance on Section 5 with a reference to "duties and responsibilities of the Secretary relating to conservation and utilization of the water resources of the Nation" and a description of the authority of the Secretary as being to act in accordance with the "Federal Power Policy." The phrase and the capital letters are petitioners' own, not those of Congress. Pet. Br. 40.

So also, in developing their contentions petitioners find it necessary to turn for additional support to a provision in Section 3 of the Flood Control Act of 1917 for transmittal of certain

reports, arguing that Section 5 of the 1944 Act must be interpreted "with due regard" to that provision (Pet. Br. 80–81).

Finally, petitioners argue that Section 5 must be interpreted "with due regard * * * to the responsibilities inherent in the functions of the Secretary as the head of the Department of the Interior" (Pet. Br. 80, *et seq.*).

But examination of these several claims will show that they cannot stand alone or by leaning on each other.

Section 5 of the Flood Control Act of 1944.—The terms of Section 5 authorize the Secretary to dispose of the output of War Department hydroelectric projects, but make no reference to planning such projects (58 Stat. 890):

> SEC. 5. Electric power and energy generated at reservoir projects under the control of the War Department and in the opinion of the Secretary of War not required in the operation of such projects shall be delivered to the Secretary of the Interior, who shall transmit and dispose of such power and energy in such manner as to encourage the most widespread use thereof at the lowest possible rates to consumers consistent with sound business principles, the rate schedules to become effective upon confirmation and approval by the Federal Power Commission. Rate schedules shall be drawn having regard to the recovery (upon the basis of the application

> of such rate schedules to the capacity of the electric facilities of the projects) of the cost of producing and transmitting such electric energy, including the amortization of the capital investment allocated to power over a reasonable period of years. Preference in the sale of such power and energy shall be given to public bodies and cooperatives. The Secretary of the Interior is authorized, from funds to be appropriated by the Congress, to construct or acquire, by purchase or other agreement, only such transmission lines and related facilities as may be necessary in order to make the power and energy generated at said projects available in wholesale quantities for sale on fair and reasonable terms and conditions to facilities owned by the Federal Government, public bodies, cooperatives, and privately owned companies. All moneys received from such sales shall be deposited in the Treasury of the United States as miscellaneous receipts.

Petitioners' brief argues that from these express powers other powers must flow, such as authority for the Secretary to participate in the planning of Army projects because his participation would be necessary to a public power program envisioned by petitioners. That program would include development of water power resources through multipurpose projects and distribution of the benefits through the most wide-

spread use of power at low rates (Pet. Br. 46), in a competition with private power companies which would drive their rates down (Pet. Br. 47). Furthermore it would be "unthinkable," according to petitioners' brief, to delegate to the Secretary the function of disposition of power on so large a scale without delegating authority as to the projects to be undertaken (Pet. Br. 82–83). Again, petitioners' brief argues, the Secretary has a "utility obligation" to serve customer loads analogous to that of a privately owned public utility. He "must" plan to meet the future utility loads of his customers (Pet. Br. 85–87) and to construct transmission facilities with regard to interconnections with possible future sources of power (Pet. Br. 87–88).

But these are all arguments to be addressed to Congress, not the courts. If Congress had intended to build up such a public power system, it could easily have said so. The terms of Section 5 are plain that it did not say so and the legislative history of the Section indicates that its limited language was used deliberately. The Senate Committee Report explains the origin and limited purpose of what is now Section 5 (which it referred to in the course of its discussion as "a proviso"):[41]

> The committee desires an amendment which provides a convenient and practical

[41] S. Rep. No. 1030, 78th Cong., 2d Sess., p. 3.

> method of disposing of power at projects under the control of the War Department without setting up a public power trust which would be unduly competitive with established private power utilities. The committee, therefore, has inserted a proviso which authorizes the Secretary of the Interior to construct and acquire only such transmission lines or related facilities as may be necessary in order to make the power and energy generated at such projects available in wholesale quantities for sale on fair and reasonable terms and conditions to facilities owned by the Federal Government, public bodies, cooperatives and privately owned companies.

Petitioners' brief attempts to take the standards provided in Section 5 to govern the Secretary's discharge of the limited responsibilities expressly vested in him, and generalize those standards into a "Federal Power Policy"; then to argue that authority should be implied for the Secretary to plan federal development of projects like Roanoke Rapids as being necessary to the fullest effectuation of that policy. Petitioners argue that when the Committee said "without setting up a public power trust which would be unduly competitive with established private power utilities" it manifested its intention to provide for a disposition of power which would be competitive but not unduly so (Pet. Br. 58). Petitioners' conception of competition that

is not undue is shown when they say (Pet. Br. 62):

> * * * it is important that the amount of public power distributed should be large enough to constitute an effective competitive element in the distribution of power in the area. Experience has shown that, with such an effective competitive element, power rates are lowered and consumption of power is increased, with resulting benefit both to consumers and to private power companies * * *.

But Congress has nowhere enacted any such general policy into law or vested the Secretary with the broad power to do whatever is necessary to the effectuation of such a general policy. The debates in Congress at the time Section 5 was under consideration show that the question was clearly presented whether the Secretary should be given just such power as he now seeks to have imputed to him. The views, *pro* or *con*, expressed by individual members of Congress in the debates are, of course, not reliable guides to congressional intent, except as they are shown to have prevailed in committee action or congressional votes. But the explanations of a bill given by the chairman of the committee which reports it stand on a different footing. Mr. Whittington, whose statements appear in the following excerpts from the debate in the House on the 1944 Flood Control Act was chairman of that Committee. And Mr.

Jenkins' remarks are also significant for they serve to show congressional alertness to the issue of granting the Secretary the powers now claimed. Such alertness, coupled with congressional abstention from any express grant of such power in the resulting legislation, would be persuasive that that power was not intended to be granted even without Chairman Whittington's statements (90 Cong. Rec. 9418–9419):

> Mr. JENKINS. Suppose there is a project now that is being built and it can be built without the equipment to manufacture power. Does the gentleman mean that the Secretary of the Interior would have sufficient authority under this bill to compel the building of that project so that he would have power-generating facilities?
>
> Mr. WHITTINGTON. He has no authority whatsoever with respect to the construction. The necessity for this language is this: In some of these reservoirs that are authorized to be constructed there is generation of power. The concrete proposition that confronted our committee was this: Shall we authorize these projects where power is incidental and make no provision for disposal of it, or shall we leave it to the President of the United States to set up an executive authority as he has done in Arkansas, Texas, and Oklahoma?
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> * * * * *
>
> Mr. JENKINS. The gentleman has outlined a case I have in mind exactly. Sup-

pose the Secretary of War says, "I do not think this project should be equipped with power facilities" and the Chief of Army Engineers says, "I do not think it should be done," but the Secretary of the Interior comes along and says, "I know it has great possibilities of power, and I think it should be done," and he seeks the aid of the President and the President encourages it until it is done. Does not that settle the matter so that one could reasonably conclude that this bill does fix and announce a policy that the Secretary of the Inferior and the President can control the power policy of the Nation?

Mr. WHITTINGTON. We have settled that. We have said that the matter of power is to be passed on by the Chief of Engineers and by the Federal Power Commission. We have provided that there shall be a transmittal of projects so that each can get the benefit of the other's views. I may say in reply to the gentleman's question that the Secretary of the Interior has no control whatever over the construction of any dam under the control of the War Department.

Mr. JENKINS. Can the Secretary of the Interior under the language and authority of this law build a foundation upon which he and the President can scatter some more TVA's all over the nation? I should hope it does not.

Mr. WHITTINGTON. No, he has no power whatever with respect to building and con-

> struction, and his power is limited only to the sale and transmission of the excess power generated at dams authorized and constructed by the War Department.

Elsewhere Chairman Whittington made plain that flood control, not power, was the primary purpose of the Flood Control Act (90 Cong. Rec. 4122, 4199, 4202) as did Chairman Overton of the Senate Committee (90 Cong. Rec. 8625).

Furthermore the fact that Congress, by Section 7. (b) of the Federal Power Act, has expressly vested in the Federal Power Commission the responsibility which the Secretary seeks to have imputed to him makes plain that nothing less than the clearest express statutory language would suffice to qualify that grant of authority to the Commission as it would be qualified if petitioners' view were to prevail (*supra*, pp. 83, 99).

In fact the Federal Power Commission is organized as it is for the particular purpose of avoiding the kind of conflicting and overlapping jurisdiction petitioners' claim would create. For the Federal Water Power Act of 1920, of which the present Section 7 (b) was a part, was intended to vest such powers in the new Commission, superseding powers theretofore exercised by the Secretary of the Interior and other Department heads "in connection with water power development." The Senate Committee on Com-

merce, reporting the bill subsequently enacted into law, said:[42]

> The salient features of the bill herewith reported are the creation of a commission known as the Federal Power Commission, to be composed of the Secretaries of War, Interior, and of Agriculture. To this Commission are given the powers heretofore exercised by the Secretaries in connection with water power development under their several jurisdictions.

Ten years later, in 1930, the Act was amended, reorganizing the Commission as an independent agency composed of five full-time Commissioners, with its own personnel.[43] At hearings on the bill providing for such reorganization, the question of the relation of the responsibilities of the new Commission to those of the Departments with respect to their several interests was expressly discussed in the testimony of the then Secretaries of Agriculture and the Interior.

The Honorable Arthur M. Hyde, Secretary of Agriculture, spoke in favor of the setting up of an independent commission with its own staff instead of a commission dependent upon employees of the Departments. After recognizing that the War Department had navigation interests, and the Bureau of Indian Affairs, Geological Survey, and Bureau of Forestry had interests in

[42] S. Rep. No. 180, on H. R. 3184, 66th Cong., 1st Sess., p. 6.
[43] 46 Stat. 797.

lands, which "might be contrary to the views of a power-minded commission * * *," he went on to say:[44]

> But I do not think we are entitled to presume that a Power Commission to be set up is going to be so power-minded that it will be hostile to the other interests of the Government in other fields and I am inclined to think that all of the interests of Forestry and Indian Affairs and Public Lands, and so forth, can be served by the presentation of their side upon the occasion of any hearings.

The Honorable Ray Lyman Wilbur, Secretary of the Interior, concurred:[45]

> I agree with Secretary Hyde that we can well allow these departments to be represented at hearings before the commission to present phases of departmental interest, rather than to have the control remain in the departments. Otherwise, even though you set up the commission, you will leave in the hands of the Secretaries, or in the hands of the bureau heads, the power to negate whatever the commission may want to do, that is, to ask the consent of the department involved.
>
> I can not conceive of this Federal Power Commission really being effective unless it controls all power sites where it grants

[44] Hearings, H. Committee on Interstate and Foreign Commerce, on H. R. 11408, 71st Cong., 2d Sess., pp. 32–33.

[45] *Ibid.*, pp. 48–49.

> licenses, for if you have to ask the permission of this department or that department, there will be difficulties that will be absolutely impossible to overcome.

These views prevailed in the adoption of the reorganization amendment in 1930.

In the light of this deliberate resolution of the question of overlapping agency jurisdictions by Congress in the enactment of the 1920 Act and the 1930 amendment, the courts should refuse to reopen the question in the absence of a later express and unmistakable grant of the claimed authority to the Secretary. As we have shown, Section 5 of the Flood Control Act of 1944 is not such an express and unmistakable grant of any responsibility for planning development of sites like Roanoke Rapids.

Section 3 of the Flood Control Act of 1917.— Petitioners' reliance on Section 3 of the Flood Control Act of 1917 [46] to show that the Secretary is vested with responsibility in relation to the planning of projects (Pet. Br. 80–81) ignores the patent fact that Section 3 does not itself vest in the Secretary or any other department head any authority of that nature—it merely provides procedures for eliminating duplication of work and coordinating the various services of the Government provided for by other statutes.

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[46] 39 Stat. 950.

The relevant parts of Section 3 are as follows:

> * * * And the heads of the several departments of the Government may, in their discretion, and shall upon the request of the Secretary of War, detail representatives from their respective departments to assist the Engineers of the Army in the study and examination of such watersheds, to the end that duplication of work may be avoided and the various services of the Government economically coordinated therein: *Provided,* That all reports on preliminary examinations hereafter authorized, together with the report of the Board of Engineers for Rivers and Harbors thereon, and the separate report of the representative of any other department, shall be submitted to the Secretary of War by the Chief of Engineers, with his recommendations, and shall be transmitted by the Secretary of War to the House of Representatives, and are hereby ordered to be printed when so made. * * *

The phrase "to the end that duplication of work may be avoided," shows that new authority was not being created in other departments. The Congressional purpose was elimination of duplication in the discharge of existing functions, not creation of additional functions overlapping those of the Commission under Section 7 (b) of the Power Act, which petitioners' contention would entail. Unless a department has been given authority by some other statute, Section 3 is inapplicable. Petitioners' argument on Section 3 im-

plicitly recognizes this when it falls back on Section 5 of the 1944 Act, saying that Section 3 shows that the Secretary's responsibility begins with project planning, "* * * especially in view of the enactment of Section 5 * * *" (Pet. Br. 81). But of course, if the authority cannot be found either in Section 5, as previously shown, or Section 3, as here shown, it cannot be found in both.

Furthermore it should be pointed out that if petitioners' view of Section 3 were well founded the Postmaster General and heads of all other departments, as well as the Secretary of the Interior, would be authorized to participate in planning federal development of hydroelectric sites like Roanoke Rapids. If that were true, each member of the President's Cabinet might be "aggrieved" by an order of the Federal Power Commission and appeal to the courts for vindication of his view of how the Commission should perform its duties.

The Secretary's freedom to submit reports and recommendations to Congress.—The only other claimed source of authority for the Secretary to represent an interest of the United States in the planning and development of projects like Roanoke Rapids is in the asserted practice of the Secretary as head of his Department to submit reports, recommendations and testimony to Congress, upon matters affecting his Department, and

in his asserted participation in the execution of the constitutional responsibility of the President to recommend to Congress "such measures as he shall judge necessary and expedient." But the exercise of this freedom to urge his views upon Congress does not make the Secretary the legal representative of interests of the United States with authority to vindicate those interests before commissions and courts. Such freedom is conferred in no terms which define the interests so represented and so permit the Commission or the courts to determine whether a Commission action would be favorable or adverse to those interests, as would be necessary to enable a determination to be made whether the United States, so represented, would be aggrieved.

2. *United States' interests in transmission and disposition of power in Buggs Island-Roanoke Rapids area are not adversely affected*

Urging that the Secretary is in competition with VEPCO in the disposition of power to public bodies, cooperatives, and others in the Buggs Island-Roanoke Rapids area (Pet. Br. 54–57), petitioners claim that withdrawal of the Roanoke Rapids site from the possibility of federal development adversely affects the interests of the United States in such disposition of power in two ways: first by loss in the amount and quality of power to become available for distribution by the

Secretary and, second, by an increase in cost of generation per unit of power (Pet. Br. 59–60)."[47]

In discussing this claim we shall show that the interests of the United States in the disposition of Roanoke Rapids power are not involved because no such interests have been committed to the Secretary's administration, and that any interests in Buggs Island power, which have been committed to the Secretary, are not adversely affected.

Roanoke Rapids Power.—We have heretofore shown that the Secretary has no statutory responsibility for determining whether a site like Roanoke Rapids shall be developed, his responsibility under Section 5 being limited to disposing of the output of such projects as are in fact developed (*supra*, pp. 107–121). Consistently with what we have there shown, no responsibility can be imputed to the Secretary with respect to disposition of the output of a project until federal development of that site is undertaken and availability of its output foreseen. It follows from the fact that availability of the output of a federal development of the Roanoke Rapids site could not be foreseen, that, with respect to that site, the Secretary has no authority under Section 5 and hence represents no interests of the United

[47] It may be observed that such "loss" and "increase" are only in relation to the hypothetically possible developments; amounts and costs of presently available power remain unaltered.

States.[48] The United States, in the statutory capacity of the Secretary, therefore, cannot be "aggrieved."

Buggs Island Power.—While the Secretary has been vested with responsibility for disposing of Buggs Island power by Section 5 of the Flood Control Act of 1944, analysis of the interests of the United States thereby committed to the Secretary will show that those interests are not adversely affected by the issuance of the license, and the United States is, for that reason, not aggrieved.

Petitioners' argument is that if Roanoke Rapids were developed by the Army, its operation could be integrated with that of Buggs Island, as a single enterprise, and such integration would permit the combined output of the two plants to be produced more nearly on the days and at the hours needed to carry utility loads, *i. e.*, the power output would have a "higher load factor" and be "more salable and more valuable." Also that such

[48] The question does not need be decided here as to the precise moment at which some implied responsibility of the Secretary arises to prepare for the discharge of his duty to transmit and dispose of power from an Army project which is in fact constructed or undertaken. Presumably resolution of that question would depend on the facts of the particular case as to what advance responsibility is reasonably imputed. The court below held that the time of entry upon construction of the project itself would be reasonable and there is no basis in the record for questioning its holding.

integration would result in a lower average cost of production per kwh than operation of Buggs Island alone (Pet. Br. 59–60). From this Petitioners argue that withdrawal of the Roanoke Rapids site from possible governmental development adversely affects the disposition of Buggs Island power.

But this conclusion does not follow. The only electric power in the so-called Buggs Island-Roanoke Rapids area which Congress has directed the Secretary to dispose of is Buggs Island power. Under the standards of Section 5, the cost to be taken into account in fixing rates for that power and the purposes to be served by disposition of that power are those relating to that power, and to that power only. The cost of production at Buggs Island will be the same regardless of what the average cost would be of producing power by any combination of plants in which Buggs Island might theoretically be included. So long as Buggs Island power is the only power in the vicinity which the Secretary has the duty of distributing, the statutorily defined interest of the United States in the disposition of that power will be served, and can only be served, by application of the standards spelled out in Section 5 to the disposition of that power alone. It is immaterial what the effect of those standards might be if applied to the disposition of power from some

hypothetical combination of Buggs Island with other plants.

Moreover, the fact that petitioners do not contend that Buggs Island power cannot be disposed of in compliance with the provisions of Section 5 unless Roanoke Rapids is developed by the Government, is sufficient in itself to establish that the interest of the United States in the disposition of that power, as defined in Section 5, is not adversely affected by the licensing of Roanoke Rapids.[49]

Petitioners also make a related contention, stated in general terms but inferentially applicable to the disposition of Buggs Island power, that the "order operates to surrender in large measure the benefits of the Government's investment in upstream developments to private power companies, and to prevent the distribution of such benefits among the people in the area, in accordance with Section 5" (Pet. Br. 62).

But this contention overlooks the fact that VEPCO is required by the terms of Section 10 (f) of the Act to reimburse the United States "for such part of the annual charges for interest, maintenance and depreciation" on the Buggs Island project as the Commission may deem equitable to reimburse the United States for direct benefits to VEPCO's Roanoke Rapids operations from the Buggs Island project (*cf.*

[49] See note 50, p. 126, *infra*.

I, 57). These headwater benefit payments will, of course, to some extent offset the cost of producing power at Buggs Island. Therefore, so far as headwater benefits from the Buggs Island project are involved, again, the statutorily defined interests of the United States are not adversely affected by the issuance of the license—in fact are effectuated by the license conditions specified in Section 10 (f) of the Power Act.

One other argument made by petitioners may be considered with respect to the Secretary's interest in the disposition of Buggs Island power. That is the argument that in disposing of power under Section 5, the Secretary is a competitor of VEPCO, and thus is brought within the rule of the cases holding competitors entitled to review as parties aggrieved, such as *F. C. C.* v. *Sanders Bros. Radio Station,* 309 U. S. 470, 476–477; *Scripps-Howard Radio, Inc.* v. *F. C. C.,* 316 U. S. 4, 14–15; *National Coal Assn.* v. *F. P. C.,* 191 F. 2d 462, 463 (C. A. D. C.) (Pet. Br. 53–58).

With respect to Roanoke Rapids power, we have already shown that the Secretary represents no interest of the United States as a competitor or otherwise (*supra,* pp. 122–123). If, with respect to Buggs Island power, the Secretary is engaged in economic, political or legal rivalry with VEPCO,[80]

[80] The Government can procure the capital needed for development of a project like Roanoke Rapids at a lower cost of money than a privately owned electric utility. Its pro-

such rivalry does not necessarily mean that the Commission's order adversely affects the interests of the United States committed by statute to his administration, so as to constitute aggrievement. For the claimed competitor interests adversely affected by the Commission's order are not those in the disposition of Buggs Island power in accordance with the terms of Section 5—those interests are not affected as we have shown (*supra*, pp. 124–125). Rather they are found only in the extra-legal "Federal Power Policy" which, we have seen, Congress was careful not to write into the Flood Control Act of 1944 (*supra*, pp. 111–115).[51] They are therefore not interests of the United States, or of the Secretary in his statutory capacity, and no effect of the Commission's order on such extra-legal interests can constitute aggrievement within the meaning of Section 313 (b).

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duction costs, and its rates based on such costs, will therefore be lower than those of a private company. This may help explain why petitioners do not complain of any inability to market Buggs Island power. See *supra*, p. 125.

[51] Petitioners describe the claimed interest of the Secretary as "an interest in the development of public power generally and, in the case of flood control projects in particular, from the time investigations are authorized to be made" (Pet. Br. 94); as having come "into being when he was first charged with responsibilities relating to the development of land and water resources" (Pet. Br. 90–91); as including on a large scale the "duty and responsibility to make recommendations as to future sources of electric energy" and to be "concerned with the timing of construction, with the amount of power that could be made available, with the size of generating units

3. *The Standing of Petitioner, the United States, To Obtain Court Review Cannot Be Supported on the Other Alleged Interests of the United States*

Petitioners argue that where a private party is entitled to judicial review under a "party aggrieved" statutory provision for court review, like Section 313 (b) of the Power Act, he appears in court to vindicate the public interest, citing *Scripps-Howard Radio, Inc.* v. *F. C. C.*, 316 U. S. 4, 14. Hence, petitioners say, "it would follow as a matter of course that the United States or a public officer thereof, charged with statutory responsibilities, may appear to vindicate the public interest." They argue that here, since the United States (represented by the Secretary) was a "party" in the proceeding before the Commission, and has duly met the statutory procedural prerequisites to review, nothing more is required to give it standing in court, although they go on

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planned to provide a given total capacity, with the scheduling of their installation to meet the expected market conditions, and with the cost of construction" (Pet. Br. 82); and as being of "great magnitude" and embracing "all Government reservoir projects, except those under the jurisdiction of the Tennessee Valley Authority" (Pet. Br. 77).

Such claim of interests seems to be just what was apprehended by the hostile Congressman who expressed the hope that the Secretary would not be authorized to "scatter some more T. V. A.'s all over the nation" (*supra*, p. 114) and what was resolved against by the Senate Committee reporting the Flood Control Act of 1944 when they stated their purpose not to set up a "public power trust" (*supra*, p. 111).

to refer to the United States' interests *parens patriae*.[52]

But that argument errs in confusing standing to obtain court review with the scope of the contentions which may be advanced by one who has shown standing. The scope of the interests, whether public or private, which a qualified petitioner for review may vindicate by his contentions in the course of court review is not the same as, and may be much broader than, the scope of his interests which must be adversely affected to constitute him a party "aggrieved" so as to have standing to obtain such review.

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[52] Pet. Br. 43. Those interests *parens patriae*, according to petitioners, are as follows, restated according to their effect and so as not to assume the correctness of all of petitioners' legal position on the merits (Pet. Br. 43–44):

a. If a project site has been reserved for federal development, it should not be subject to licensing for nonfederal development.

b. If a river basin has been reserved for federal development, a valuable unit of that basin development should not be subject to licensing for nonfederal development.

c. If a federal development has been recommended by the F. P. C. under § 7 (b) and legislation enacted in reliance thereupon, that recommendation should not be subject to reversal.

d. Licensing of a hydroelectric site for nonfederal development represents a loss to the United States through dissipation of its potential power assets.

e. There should be no interference with the Secretary in carrying out the "Federal Power Policy" because consumers will benefit from that policy.

For example, a party aggrieved may be permitted on review of a commission order issuing a license to contend that the public interest which controls the Commission's power to issue licenses is one of the so-called interests *parens patriae* referred to by petitioners (item d, *supra*, p. 129, note 52): licensing of a hydroelectric site for non-federal development represents a loss to the United States through dissipation of its power assets. (The reviewing court would then have to consider whether that was the controlling public interest defined by applicable statutory provisions, or whether the encouragement of development and utilization of water power sites by non-federal licensees upon the terms and conditions specified in the Federal Power Act is the controlling public interest.) This contention he may advance because, being properly in court, he appears to vindicate the public interest, *i. e.*, "to bring to the attention of the appellate court errors of law in the action of the Commission." *F. C. C.* v. *Sanders Bros. Radio Station*, 309 U. S. 470, 477. But in determining whether a particular party is "aggrieved" so as to be entitled to get into court it cannot be concluded that he has substantial interests directly affected adversely, and hence is a party "aggrieved," solely because, *if* he got into court, he would make the contention as to the controlling public interest.

Once properly in court a petitioner may argue any illegality of the order; but to get into court he must show an adverse effect on his own interests. *He* must be a "party aggrieved.". His interests need not be such as would support a cause of action,[53] but they must be substantial and the adverse effect thereon must be direct.[54] The difference between the interests which will support the right to get into court and those that may be urged on the merits was made plain in *F. C. C.* v. *Sanders Bros. Radio Station*, 309 U. S. 470, 476–477, where the Court held economic injury suffered by a competitor was not an element to be considered on the merits, but was sufficient to support aggrievement for the purposes of obtaining court review. See also *F. C. C.* v. *National Broadcasting Co.*, 319 U. S. 239, 259–260 (Frankfurter, J., dissenting).

In the present case the question of standing to obtain court review becomes: are substantial interests of the United States as represented by the

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[53] *F. C. C.* v. *Sanders Bros. Radio Station*, 309 U. S. 470, 476–477; *Scripps-Howard Radio, Inc.* v. *F. C. C.*, 316 U. S. 4, 14–15; *Associated Industries* v. *Ickes*, 134 F. 2d 694, 704–705 (C. A. 2); *National Coal Assn.* v. *F. P. C.*, 191 F. 2d 462, 465 (C. A. D. C.).

[54] *American P. & L. Co.* v. *S. E. C.*, 325 U. S. 385, 388; *F. C. C.* v. *National Broadcasting Co.*, 319 U. S. 239, 260 (Frankfurter, J., dissenting), 265 (Douglas, J., dissenting); *U. S. Cane Sugar Refiners' Assn.* v. *McNutt*, 138 F. 2d 116 (C. A. 2).

Secretary of the Interior directly affected adversely by the Commission's order? Petitioners' attempt to show aggrievement from alleged adverse effect of the order on interests of the United States not represented in the statutory capacity of the Secretary must therefore be rejected. The error in that attempt is admitted in petitioners' concession already referred to (Pet. Br. 39–40):

> It is conceded, as the court below said (V, 31), that before a public officer may attack an administrative order before the courts, he must be able to point to an interest, for which he is charged with responsibility, that may be adversely affected by the order. * * *

B. THE REA ASSOCIATION IS NOT "AGGRIEVED"

The claim that the petitioners in No. 29 have standing to obtain court review is based on the interests of the REA cooperatives as local distributors competing with VEPCO and as representatives of consumer interests (Pet. Br. 62–63). Petitioners say that those interests are adversely affected by the withdrawal of the Roanoke Rapids project from possibility of federal development. With such withdrawal, they say the possibility disappears of additional and lower cost power from that source ever becoming available for transmission and disposition by the Secretary. And with its disappearance the possibility also

disappears that the REA cooperatives would participate in benefits from such transmission and distribution which otherwise they might possibly enjoy under the preference provisions of Section 5 of the Flood Control Act of 1944.

But such remote "possibilities" are not substantial interests sufficient to support standing to obtain court review.

In an attempt to overcome some of the cumulative contingencies which are apparent in this claim of interest, petitioners rely on what they say is the "well established fact that the introduction of low cost public power in an area furnishes a competitive element which reduces electric power rates throughout the area" (R. 63–65).

But this merely emphasizes the speculative nature of these petitioners' claimed interests. These interests are not present interests in any power or right to any power now available or to become available under existing circumstances, but only possibilities of future benefits dependent upon further acts of Congress which may never be enacted. And the withdrawal of Roanoke Rapids from the possibility of federal development, far from reducing the possibility of additional low cost power coming into the area, may prove to have the opposite effect. Furthermore the REA cooperatives' dim view of their future prospects of low cost power as a result of the

licensing order ignores the effect that could be given to VEPCO's development of Roanoke Rapids under the F. P. C. license which makes the maximum rate base the licensee may claim the depreciated original cost of the project—a limitation analogous to the cost of production basis of federal power rates on which petitioners base their entire claim of interest under Section 5 of the Flood Control Act. Section 20.

Thus it is apparent that the cooperatives' interests are not affected now. Whether they ever will be depends upon a comparison of what might happen after a chain of contingencies and speculations as to events which would follow if the licensing order were held invalid, with what might happen after a chain of contingencies and speculations as to events which would follow if it is upheld.

Interests so remote and contingent upon such a combination of uncertainties are too insubstantial to support a claim of aggrievement giving standing to obtain review.[55]

CONCLUSION

For the foregoing reasons the judgment below should be sustained on both the ground that the

[55] See cases cited *supra*, p. 131, note 54.

Commission's order was valid and that petitioners did not have standing to obtain court review.

Respectfully submitted.

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The Secretary of the Interior and the Federal Power Commission are adverse parties in this proceeding, and I am authorizing each to be represented in the Supreme Court by agency counsel.

ROBERT L. STERN,
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